TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]308

WILL F. THOMAS, SHERIFF AND COLLECTOR; LITTLE RIVER DRAINAGE AND LEVEE DISTRICT OF SEVIER COUNTY, No. 1, ET AL., APPELLANTS,

vs.

KANSAS CITY SOUTHERN RAILWAY AND TEXARKANA AND FORT SMITH RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MARCH 11, 1922.

(28,762)

(28,762)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 807.

WILL F. THOMAS, SHERIFF AND COLLECTOR; LITTLE RIVER DRAINAGE AND LEVEE DISTRICT OF SEVIER COUNTY, No. 1, ET AL., APPELLANTS,

vs.

KANSAS CITY SOUTHERN RAILWAY AND TEXARKANA AND FORT SMITH RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1921, of said court, before the Honorable Walter H. Sanborn and the Honorable Kimbrough Stone, Circuit Judges, and the Honorable Jacob Trieber, District Judge.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: On the sixteenth day of September, A. D. 1919, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein Will F. Thomas, Sheriff, etc., et al., were Appellants, and the Kansas City Southern Railway Company, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Order enlarging time to file transcript.)

United States Circuit Court of Appeals, Eighth Circuit.

Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, Plaintiffs in Error.

vs.

Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Defendants in Error.

This September 8, 1919, on application of Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, and for good cause shown, the time in which the record on appeal in this cause from the District Court of the United States for the Western District of Arkansas may be lodged in the United States Circuit Court of Appeals for the Eighth Circuit is hereby enlarged and extended to October 1, 1919, and the return day of said appeal enlarged and extended to and including that date.

FRANK A. YOUMANS,
United States District Judge,
Western District of Arkansas.

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2 (Citation and Acceptance of Service.)

United States of America to Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Western District of Arkansas, wherein Will F. Thomas, Sheriff and Collector, Little River Drainage

and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Frank A. Youmans, Judge of the District Court of the United States for the Western District of Arkansas, this 14 day of July, in the year of our Lord one thousand nine hundred and nineteen.

FRANK A. YOUMANS,
Judge United States District Court for the Western District of Arkansas.

The Appellees, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, hereby accept service of the above citation and waive further service thereof.

KANSAS CITY SOUTHERN RAILWAY COMPANY AND TEXARKANA & FORT SMITH RAILWAY COMPANY.
By James B. McDonough,
Their Solicitor.

Endorsed: Filed in the District Court on August 25, 1919.

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3 District Court of the United States, Western District of Arkansas, Texarkana Division.

Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company, Plaintiffs,
No. 33 vs. Equity.
Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, Defendants.

Record of proceedings in the District Court of the United States for the Western District of Arkansas, Texarkana Division.

4 Bill of Complaint.

Filed in U. S. District Court March 19, 1918.

In the United States District Court for the Western District of Arkansas, Texarkana Division.

The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company, Plaintiffs,

vs.

Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, Defendants.

Come the plaintiffs, the Kansas City Southern Railway Company and the Texarkana & Fort Smith Railway Company, and for cause of action in equity against the defendants and each of them, state as follows:

The Kansas City Southern Railway Company is a railroad corporation, organized and existing under the laws of the State of Missouri, and is a citizen and resident of said State of Missouri, within the meaning of the law, and owns and operates a line of railroad in connection with other corporations, from Kansas City in the State of Missouri, to the Gulf of Mexico, and owns and operates a line of railroad through several counties in the State of Arkansas, and among others, through the County of Sevier, in said State.

The Texarkana & Fort Smith Railway Company is a railroad corporation, organized and existing under the laws of the State of Texas, and is a citizen and resident of said State of Texas, within the meaning of the law. Said The Texarkana & Fort Smith Railway Company owns and operates a line of railroad in the State of Texas, which line of railroad, in connection with the line operated by the Kansas City Southern Railway, is known as Port Arthur Route. The Texarkana & Fort Smith Railway Company operates in the State of Texas, and in connection with the Kansas City Southern Railway Company, makes a through line of railroad from Kansas City to the Gulf of Mexico. The said The Texarkana & Fort Smith Railway Company owns the right of way of said line of railroad in Sevier County in the State of Arkansas, being the right of way and line of road over which the Kansas City Southern Railway Company operates a line of railroad in said State of Arkansas, and throughout the county of Sevier. The Kansas City Southern Railway Company is interested in the right of way owned by the Texarkana & Fort Smith Railway Company, by reason of operating contracts and agreements between the Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company.

This suit is of a civil nature, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00. The defendants are citizens and residents of the Western District of Arkansas, Texarkana Division.

The defendant, Will F. Thomas, is the Sheriff and collector of the County of Sevier, State of Arkansas. The defendant, Little River Drainage & Levee District of Sevier County No. 1 is an alleged drainage and levy district formed under the alleged authority of Act 186 of the General Assembly of Arkansas of 1915, as amended by Act 79 of the Acts of the General Assembly of Arkansas of 1917. The defendants E. W. Beeson, G. A. Henry and Frank Ethridge, are the directors of said Little River Drainage and Levee District of Sevier County No. 1, and are named as such directors in said
6 Act 186 of 1915.

The said directors and the alleged Drainage and [Levy] District are attempting to proceed under the authority of said Acts of the Legislature to make the improvements provided for in said Act. Under the authority of said Act, the said directors have attempted to levy taxes and assessments against the property of the plaintiffs for the construction of drains and [levies] and ditches, as set forth in said Act. The plaintiffs allege that said alleged taxes and assessments are illegal and unlawful actions, and are inequitable and unjust, for the reasons hereinafter set forth.

The plaintiffs further allege upon information and belief, that the defendants, E. W. Beeson, G. A. Henry and Frank Ethridge, are interested in some way unknown to the plaintiffs, in the lands located in said Drainage and [Levy] District. The plaintiffs allege that the greater portion of said lands were originally owned by the Neal Springs Lumber Company and the plaintiffs are advised that the defendants named as Commissioners, are either directly or indirectly interested in the ownership of said lands, or some of them. The plaintiffs therefore allege that the purpose in organizing said Improvement District is to benefit the individual lands of the defendants, E. W. Beeson, G. A. Henry and Frank Ethridge, or the lands of other persons, said other persons being represented by said defendants.

The plaintiffs further allege that there are included in said alleged Drainage and Levee District 2 1/10 miles of track of the main line of the Texarkana & Fort Smith Railway Company and Sitxy-two one hundreth (.62) of what is

known as the Neal Springs Detour. The boundaries
7 of said district, as far as they can be determined by the plaintiffs, are set forth on a map and blue print hereto attached and made a part of this complaint. Said boundaries are set forth in yellow and the line of railroad of defendants run across the northwestern end of said area, and said line of railroad is in red on said map or blue print.

Plaintiffs further allege that the acreage of the 2.1 miles of main track above referred to amounts to 27.66 acres, and the acreage of the .62 Neal Springs detour amounts to 12.77 acres, making a total of 44.43 acres of areal surface of plaintiffs' right of way in said Drainage and [Levy] District.

The plaintiffs further allege that, as far as they can determine the total area outside of their right of way in said Drainage District and Levee is approximately 28,000 acres. Plaintiffs allege that the defendants have caused to be placed upon the lands outside of the lands of the plaintiffs, an unusually low valuation, said valuation being as the plaintiffs are informed, less than 50% of the value of said lands. Plaintiffs allege that the right of way and property of the plaintiffs herein is assessed in excess of 50% of its value.

Further complaining, the plaintiffs state that their track which crosses the northwestern end of said Drainage & [Levy] District does not overflow, and does not need any levee to protect it from overflow, nor does the right of way of the plaintiffs suffer any by reason of overflow. The plaintiffs further allege that said right of way and track do not need to be drained. Plaintiffs allege that the construction of said drains, levees, ditches, contemplated and authorized by said Act of the Legislature, will be of no benefit whatever to the property of the plaintiffs, and the property of the plaintiffs is not benefited in any manner whatever by the
8 construction of said alleged drains, ditches and levees. The plaintiffs further allege that under said Acts of the General Assembly of the State of Arkansas, plaintiffs have had no opportunity to introduce evidence and to prove that their property was not benefitted by said improvement.

Plaintiffs further allege that they are engaged in Interstate Commerce and in carrying the mails of the United States, and that the President of the United States, under Act of Congress, giving him authority so to do, has taken possession of the operation of the plaintiffs' lines of railroad.

Plaintiffs further allege that the Little River Drainage and Levee District of Sevier County No. 1, is wholly illegal and

void, and that assessment of taxes attempted to be collected by the defendants, are wholly illegal and void, for the reasons given below.

The plaintiffs further allege that Will F. Thomas, the defendant, is the Sheriff and Collector of Sevier County, and said Will F. Thomas, under said Acts of the General Assembly of the State of Arkansas, will be compelled to proceed with the collection of said assessments and taxes, and he will so proceed to collect same unless he is restrained by the order of this court. Plaintiffs allege that under said Acts of Arkansas, said Thomas as Collector, is required to collect said taxes on or before the 10th day of April, 1918.

Plaintiffs further allege that the directors of said Drainage and Levee District, being the defendants above named, have assessed the property of the plaintiffs in said Drainage and Levee District as follows:

9 2.1 miles main track at $27,000.00 per mile, total $56,000.00.

.62 mile Neal Springs Detour at $17,000.00 per mile, total $10,540.00.

.89 of a mile, side track, at $3000.00, total $2,670.00 making a total valuation of $69,910.00.

The defendants, E. W. Beson, G. A. Henry and Frank Ethridge have assessed against that property as taxes and assessments and benefits for the year 1917, the sum of $4,194.60, and said defendants have assessed against all the other real property in said district, the sum of $3,151.52, as the amount of assessments, taxes and benefits to be collected against the approximate area of 28,800 acres. The said defendants have, therefore, assessed against the 40.43 acres of the plaintiff's property 57% of the total assessments to be collected against all the property. The plaintiffs allege that this is an effort to use authority of the state to take illegal exactions and assessments from the property of the plaintiffs, and to apply the same to the betterment and improvement of the property of the individual owners of the lands located in said improvement district. Plaintiffs allege that said taxes are illegal and void, inequitable and unjust, for the following reasons:

1st. The said Act, being Act 186 of the General Assembly of 1915 of the State of Arkansas, as amended by Act 79 of the Acts of 1917, is illegal and void, because it is an attempt to take the property of the plaintiffs and transfer it to the own-

ers of the lands in said alleged Drainage District, thereby taking private property without just compensation, contrary to the Constitution of the State of Arkansas, and contrary to Section 1 of Article 14 of the Constitution of the United States.

10 2nd. The said Act No. 186 and the amendments thereto are illegal and void, because they do not assess any benefits, and do not find any benefits against the property of the plaintiffs. Therefore, said Acts are an attempt to take the property of the plaintiff, without due process of law, and contrary to Section 1 of the 14th Amendment to the Constitution of the United States. The said Acts are also illegal and void because they do not provide for the collection of assessments in accordance with benefits.

3rd. The property of the plaintiffs will not receive any benefits whatever from the construction of the drains, levees and ditches, provided for in said Act.

4th. The said Acts are illegal and void, because the boundaries of the said district are indefinite and uncertain. The attempted assessments are illegal and void, because no benefit can or will accrue to the property of the plaintiffs.

5th. The said attempted assessments and taxes are illegal and void, because they are assessed upon a valuation basis and not upon an acreage basis.

The plaintiff's further allege that unless a temporary restraining order is granted herein against the said illegal assessments and illegal exactions, the defendants, under the laws of Arkansas, will proceed to assess heavy penalties against the plaintiffs and their property, and will proceed to the collection of said illegal exactions.

In consideration of the premises, the plaintiffs pray:

First: That a summons be issued in equity against each of the defendants.

Second: That a temporary restraining order be granted upon due notice, and upon a proper hearing on an application for said temporary restraining order, upon the plaintiff giving such bond as may be required by the court.

Third: That upon a final hearing herein, the said tem-
11 porary restraining order be made permanent, and absolute.

Fourth: That plaintiffs have and recover of and from the defendants all their costs in this action laid out and expended, and that they have all and further relief to which they may be in equity and good conscience entitled.

JAMES B. McDONOUGH,
Solicitor for Plaintiffs.

Affidavit.

State of Arkansas,
County of Sebastian—ss.

I, James B. McDonough, on oath state that I am one of the attorneys of the Kansas City Southern Railway Company, and that the matters and things set forth in the above and foregoing complaint, so far as my knowledge goes, and to the best of my knowledge and information, are true.

JAMES B. McDONOUGH.

Subscribed and sworn to before me this 18 day of March, 1918.

D. E. GUSTAFSON,
(Seal) Notary Public.

My commission expires Mar 22-1920.

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12 Amendment to Bill of Complaint.

Filed in U. S. District Court March 27, 1918.

Come the plaintiffs, and ask leave of the court to amend the bill of complaint herein by adding thereto the following:

I.

Under Act No. 186 of the Acts of 1915, the approximate area of said Drainage District was, as alleged in said bill of complaint, 28,800 acres. Under Act No. 79 of 1917, the said Drainage District consisted of about 12,000 acres. The plaintiffs allege that under said Act No. 79 the directors of said District have attempted to make the District, attempted to be created by Act No. 79 of 1917, liable for certain expenses and liabilities of the old District, which was created under Act No. 186 of 1915. The Drainage District which was attempted to be created by Act No. 186 of 1915, was therefore more than twice the size of the area of the district attempted to be created by Act No. 79 of 1917. Without any authority there-
13 fore the directors of said Drainage District as attempted to be created by Act No. 79 of 1917, have endeavored

to and are endeavoring to levy and fix upon the property of the plaintiffs, the liabilities and obligations of the old Drainage District under Act No. 186 of 1915. This is inequitable and unjust, and the property of the plaintiffs is in no manner liable for said obligations and liabilities of the alleged old district, created under Act No. 186 of 1915, and such attempt to levy and collect from the property of the plaintiffs, assessments and taxes to meet the obligations of the old district, is taking the property of the plaintiffs without due process of law, and contrary to Section 1 of the 14th amendment to the Constitution of the United States.

II.

The plaintiffs also allege that there is included in the valuation of their property, which is set forth in the original bill of complaint herein, the right of the plaintiffs to exist as corporations, and the plaintiffs are informed and therefore allege upon information, that the values fixed upon their property by the said Act of the General Assembly, and by the Directors under the authority of said Act, assess against the intangible property and the personal property of the plaintiffs, assessments and taxes whereas personal property cannot be held liable for said assessments and taxes.

The plaintiffs therefore allege that said attempt to take from them taxes set forth in the original bill of complaint, is an unlawful effort to deprive them of their property, contrary to Section 1 of the 14th amendment to the Constitution of the United States, and contrary to the Constitution of the State of Arkansas.

14 Premises Considered, the plaintiffs pray for the relief alleged and set out in the original bill of complaint herein, and ask that this amendment be taken and considered as a part of said original bill of complaint.

JAMES B. McDONOUGH.
Attorney for Plaintiffs.

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15 Order Granting Temporary Injunction.

Entered in U. S. District Court April 1, 1918.

On this 30th day of March, 1918, comes on to be heard the application of the plaintiffs in the above entitled cause, for a temporary restraining order against each of the defendants in said cause, and it appearing to the court that the plaintiffs

had given notice to each of the defendants that this application would be made on this day to the undersigned, as Judge of the United States District Court for the Western District of Arkansas, Texarkana Division, and the plaintiffs appearing by their attorney of record, and the defendants appearing by their Attorney, James D. Head;

And it further appearing to the court upon the facts set forth in the bill of complaint, which is sworn to and upon the affidavits submitted, that plaintiffs are entitled to the relief prayed for, and to a temporary restraining order pending a final hearing in this court, it is therefore by the court ordered, adjudged and considered that a temporary injunction and restraining order be granted herein, enjoining Will F. Thomas as Sheriff and Collector of Sevier County, State of Ar-
16 kansas, and as Collector of Little River Drainage and Levee District of Sevier County No. 1, Sevier County, Arkansas, from collecting or attempting to collect any of the taxes and assessments or taxes or assessments against the property of the plaintiffs located in Sevier County, State of Arkansas, being the assessment of benefits assessed and levied against the property of the plaintiffs herein described in the complaint until the further order of this court, and the defendants, E. W. Beeson, G. A. Henry and Frank Ethridge, as Directors of Little River Drainage and Levee District of Sevier County No. 1, and the said Little River Drainage and Levee District of Sevier County No. 1, and all its agents and representatives, be, and they are hereby enjoined from collecting the assessments of benefits set forth in the complaint, until the further order of this court.

This order is made upon condition that the complainants file with the clerk of this court a bond with good and sufficient surety, as required by law, in the sum of $9000.00.

It further appearing to the court that the complainants now tender in court a good and sufficient bond with the American Surety Company of New York as surety, the said bond is by the court approved, and the clerk is hereby directed to certify and deliver to each defendant a copy of this order.

The right is given to the defendants, or either of them, to move the court at any time for an additional bond.

Witness my hand as Judge of this court, this 30th day of March, 1918.

FRANK A. YOUMANS

Judge.

17 Order Granting Leave to Amend Answer.

Entered in U. S. District Court November 11, 1918.

This day comes defendant Little River Drainage and Levee District No. 1, of Sevier County, by James D. Head, its solicitor, and prays leave to file an amendment to its answer herein; and the court being well and sufficiently advised in the premises doth allow the same.

FRANK A. YOUMANS, Judge.

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18 Joint Answer to Complaint as Amended.

Filed in U. S. District Court November 15, 1918.

Now come all the defendants and for their joint answer to the bill of complaint and amendment thereto say:

They admit the citizenship and residence of the plaintiffs and defendants, as alleged, and admit that Will F. Thomas is Sheriff of Sevier County, and that the other named defendants are directors of the Little River Drainage and Levee District.

They are not advised, have no information sufficient to form a belief and consequently deny that the Kansas City Southern Railway Company is in any manner interested in the line of road or right-of-way of the Texarkana & Fort Smith Railway Company, as alleged; they are not advised as to which of the plaintiffs own the road, but allege the truth to be that one or the other of them own the road and right-of-way mentioned in the bill of complaint.

19 They admit they are proceeding under the acts of the Legislature named in the bill to make improvements specified therein and that they have levied taxes against the right-of-way and road-bed of the railroad running through the district, but deny that said taxes are illegal or unlawful, inequitable, or unjust for any of the reasons named in the said bill.

They admit that each of the directors of said District own some land therein, but deny that they own all the lands formerly owned by the Neal Springs Lumber Company, or that they are the owners of all the lands in the District, and deny that the said District was organized for the individual benefit of the lands of said Directors or for the benefit of any particular land, but allege that the same was organized for the benefit of all parties owning real estate therein subject to

overflow; they admit that 2.1 miles of the main line, and .62 miles of detour line of said railroad lies within the boundaries of the District; they are not advised, have no information sufficient to form a belief, and, therefore, deny that the acreage of the main line of said road in said District is only 27.66 acres and that the acreage of the detour line in said District is only 12.77 acres, or that the total acreage of both said lines is only 44.43 of areal surface therein, but allege the truth to be that the acreage of said lines is greater than 44.43 acres. They admit that under Act 186 of the Acts of 1915, a larger area of land was included within the District than is now included, but deny that said District according to said Act included 28,800 acres; they admit that there are about 12,000 acres in the District as defined by Act 79 of the Acts of 1917; they deny that the old District was more than twice the size of the District as created by Act 79 of the Acts of 1917; they deny that they are attempting to fix upon the property of the plaintiffs liabilities and obligations of the old District as defined by Act 186 of the Acts of 1915; they deny that if such liabilities were placed upon the property of the plaintiffs the same would be inequitable or unjust or that the same would be taking the property of the plaintiffs without due process of law contrary to the Constitution of the United States.

They deny that there has been assessed against the property of the plaintiffs any taxes whatever against their intangible property or personal property, and deny that thereby, or in any wise, the right of the plaintiff to exist as corporations are involved.

They deny that they have caused to be placed on the lands other than that of the plaintiffs a low valuation or that said valuation placed on said lands is only fifty per cent of the value thereof, and deny that the right-of-way of the railroad in said District is assessed in excess of fifty per cent of its value.

They deny that the tracks of said railroad, both the main line and the detour line do not need a levee to protect them from overflow, or that they do not need drainage, and deny that the levees and drains contemplated by said act will be of no benefit to the property of the plaintiffs. They are not advised, have no information sufficient to form a belief, and consequently deny that the Kansas City Southern Railway Company has been taken over by the President of the United

States, or that the same is now being operated by the Government.

They deny that the Little River Drainage District No. 1 of Sevier County is either illegal or void for any of the reasons specified in the bill, or that the assessments attempted to be collected by the defendants against the Plaintiffs are
21 illegal or void for any of the reasons set out therein; they deny that the sheriff and collector of said County will proceed to collect, unless restrained, the taxes assessed against the railroad lines within said District, but allege the truth to be that he could only return them delinquent in the event the taxes were not paid.

They deny that said District has assessed against the property of the plaintiffs therein any illegal or unjust amount, and deny that the taxes on the property within the District other than that of the plaintiffs amounts to only $3,152.52; they deny that the Directors of said District have assessed against the plaintiff's property any sum other than that authorized by law, and deny any illegal exaction is demanded of plaintiffs on account of their ownership of said property; they deny that the District is using the authority of the State to make any illegal exaction or demand of the plaintiffs or their property, and deny any attempt to apply plaintiff's property to the betterment or improvement of the lands of individual owners in the District.

Further answering herein, these defendants allege the truth to be that the legislature of the State of Arkansas, by Act 186 of the Acts of 1915, as amended by Act No. 79 of the Acts of 1917, laid out the Drainage and Levee District known as Little River Drainage and Levee District of Sevier County No. 1, and thereby determined that all the lands, including the right-of-way of the railroad therein, as shown by the terms of said Act, were in fact benefited by the improvements contemplated and by the terms of said Act it was specifically provided that the Board of Directors of said District should have the power and they were by said Act authorized, and it was made their duty to assess and levy annually a tax upon the valuation as it shall appear each year upon
22 the assessment books of Sevier County upon all land, tramroads, gas and pipe lines, telegraph and telephone lines, and also upon the valuation of the railroad track or right-of-way in said District as appraised by the Board of Railroad Commissioners or their successors, such tax not to exceed, however, in any year, the sum of six per cent of the

assessed valuation of said property, and by said Act it was made the duty of the Secretary of State to certify to said District the valuation as placed thereon by the proper State Board of the right-of-way of the railroad in said District. That under and by virtue of the authority in said Act contained, the Board of Directors made and levied against the property of all the plaintiffs, as well as against all the lands and other real property in said District for the year 1917, the sum of six per cent on the assessed valuation of said property in said District, as is by said Act [specifically] authorized; that said taxes were duly levied and are legal and valid obligation.

Further answering, these defendants allege that by the terms of said Act they were authorized to employ engineers to survey the lands in the District and to determine the line of the hills in said District entirely above overflow; that said survey was made and that by said survey the lands of the plaintiffs [refered] to in their bill have been properly and duly determined to be within the boundary of said District as provided by said Act.

That by the terms of said Act, the said Board of Directors of said District were authorized to adjust from time to time the list of lands or property subject to drainage or levee tax therein; that said Board held various meetings after the survey [refered] to, and said Board found the lands of the Plaintiffs described in the bill to be properly subject to taxation under said law, and that the taxes assessed against the
23 plaintiffs' property and that of the other owners in said District have been duly assessed in accordance with the provisions of said Act, and that the plaintiffs' taxes have been assessed upon the same basis as that of all other real property in said District; that the plaintiffs have never at any time prior to the bringing of this action protested to said Board of Directors against the inclusion of their lands in said District; nor have they in any wise sought to have the said Board adjust or correct the same insofar as it pertained to their property.

Further answering, defendants state the facts to be that the railroad tracks of the plaintiffs in said District are now compelled to cross and do cross over the low lands therein upon trestles or wood work; that said tracks are located on low and marshy lands; that large bodies of water have in the past flowed over, upon and against the right-of-way, road-bed, tracks and trestles of the plaintiffs in said District; that the maintenance of said trestle work and road-bed within said

District is quite expensive to plaintiffs; that by reason of the improvements contemplated by said District levees will be constructed to the West of plaintiffs' tracks, thereby protecting them absolutely against the waters which heretofore have come upon, over and against their road-bed, right-of-way, trestles and tracks; that thereby the maintenance of said trestles will be wholly eliminated and the road-bed and right-of-way drained and plaintiffs on that account will be saved large sums of money annually expended in the maintenance of its said road-bed and tracks and trestles in said District and the tracks, by reason of filling up said trestle work, will
24 thereby be rendered much more safe for the operation of plaintiffs' trains thereon; that said road-bed in said District, other than said trestles is made of earth, and by reason of being subject to overflow were a constant source of expense by reason of constant repair made necessary thereto on account of the overflow waters coming against the same, and that all of said expense incident to said earth or dump work made necessary by reason of such overflow waters will be eliminated by the improvements contemplated.

Further, defendants say that the improvements contemplated will reclaim practically eleven thousand acres of land tributary to said railroad, which are now low, marshy and wild, and unfit for cultivation; that said lands are very fertile and by reason of the improvements contemplated the said lands will immediately be placed in state of cultivation; that the railroad owned by the plaintiffs, or one of them, is the only line of railroad serving the lands lying in the District, and that there is no other railroad closer than fifteen or twenty miles thereto; that when said lands are reclaimed and drained by reason of the improvements contemplated, they will produce large crops of corn, cotton, hay, vegetables and other produce; that there is no local market for said produce at or near said property; that said produce so raised on said lands thus to be reclaimed, and which are not now in cultivation and which are not now subject to cultivation without drains and ditches, will be transported over the said line of railroad, thereby materially increasing the revenue of said road on account of the improvements [refered] to, and that said railroad will likewise receive by reason of said outgoing shipments a greater tonnage of inbound shipments to Horatio, the shipping point for the territory embraced
25 in said District, and said railroad will likewise be in many other ways benefited on account of the construction of said improvement.

That Act 186 of the Acts of 1915, as amended by Act 79 of the Acts of 1917, fixed the boundaries of the District and was a legislative determination of the boundaries thereof, and that the property therein was in fact benefited by said improvement and that the same is final and binding upon the plaintiffs, but, if it should be held that said determination is not binding upon the plaintiffs, then the defendants aver the truth to be that said property is in fact within said District and is subject to overflows, and that it has received or will receive from the construction of said improvement substantial benefits, as hereinabove specifically outlined.

Defendants state that the taxes assessed against the plaintiffs' property have been assessed in accordance with the law and are fair and just and equitable, and that the same have been assessed on the same basis as against the plaintiffs' property as the taxes assessed therein on the other lands lying within said District.

Further answering, these defendants allege the facts to be that this court is without jurisdiction to hear and determine the issues in this case for the reason that there is a plain and adequate remedy at law which may be pursued by the plaintiffs in this action.

Wherefore, premises considered, Defendants pray that this cause may be dismissed for want of jurisdiction, and in the alternative, having fully answered, should the court hold it has jurisdiction, these defendants pray that the plaintiffs may take nothing by reason of their complaint; that they may go hence without day, and that they may recover all
26 damages sustained by them by reason of and on account of the temporary restraining order heretofore granted in this cause; that such restraining order may be quashed, set aside and held for naught and for all other and proper relief.

JAMES D. HEAD,
Solicitor for Defendants.

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27 (Order of Submission November 15, 1918.)

This November 15, 1918, comes on this cause to be heard on the merits, the plaintiffs appearing by James B. McDonough, their solicitor and the defendants appearing by James D. Head, their solicitor; and the court having heard the evidence the cause is submitted on briefs.

FRANK A. YOUMANS, Judge.

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28 (Decree of the District Court, May 13, 1919.)

The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company, Plaintiffs,

vs.

Will F. Thomas, Sheriff and Collector, Little River Drainage & Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, Defendants.

On this day there came on for a final decree, the above entitled cause. The court in this cause took the same under advisement at the last term of the court, and rendered a memorandum opinion herein on April 22, 1919, giving the plaintiffs herein the relief prayed for. Upon the proof introduced and upon the law, the court finds as follows:

1. That the description of the boundaries of the District are not void for uncertainty. The plaintiffs except to that finding of the court.

2. The court finds that the basis of assessment is fixed by the Act of the Legislature, and that the benefits are determined by the Act of the Legislature. The plaintiffs except to that finding of the court.

3. The court holds as a matter of law that the exclusion of certain property from the district by the Act of 1917, which property was included in the Act of 1915, does not render the former act void and does not invalidate the district. The plaintiffs except to that finding of the court.

4. The court finds that under the decisions of the Supreme Court of Arkansas increased traffic to a railroad com-
29 pany may be taken into consideration as a benefit to be considered, and the court finds in this instance that a benefit would accrue to the railroad company by reason of increased traffic that would result from the proposed improvement. The plaintiffs except to that finding of the court.

5. The court finds and so holds that no direct benefits would accrue to the railroad property by reason of the proposed improvements The defendants except to that finding of the court.

6. The court finds and holds that the assessment against the property of the plaintiffs includes the franchise, and further holds that the attempted assessments deprive the plain-

tiffs of their property without due process of law, and denies them the equal protection of the laws, in violation of Section 1 of the 14th amendment to the Constitution of the United States. The defendants except to that finding of the court.

It is therefore, by the court ordered, adjudged, considered and decreed that the plaintiffs herein are entitled to the relief prayed for in the complaint, and that the temporary restraining order heretofore granted, shall be and the same is hereby made permanent, and the defendants, Will F. Thomas, Sheriff and Collector, and his successors in office, and the Little River Drainage & Levee District of Sevier County No. 1, and E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, and their successors in office, and all their agents, attorneys and employees are hereby enjoined and restrained from collecting any taxes or assessments for said Drainage & Levee District against the property of the plaintiffs, and that the plaintiffs shall have and recover of and from the defendants, all their costs in this action laid out and expended, and that execution may issue for said costs.

FRANK A. YOUMANS,
Judge.

(Petition for and Order allowing Appeal.)

Filed in U. S. District Court July 12, 1919.

Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County, No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, conceiving themselves to be aggrieved by that certain final decree made and entered on the 13th day of May, 1919, in the above entitled cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reason specified in their certain assignment of Errors which is filed herewith; and they pray that the appeal may be allowed and the transcript of those portions of the record as may be duly settled under Rule 75 of "The Rules of Practice for the Court of Equity of the United States", duly authenticated,

may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

32 WILL F. THOMAS,
Sheriff and Collector, Little River Drainage and Levee District of Sevier County, No. 1,
E. W. BEESON, FRANK ETHRIDGE, G. A. HENRY,
Directors,
By James D. Head,
Solicitor for Defendants.

Appeal granted July 14, 1919.

FRANK A. YOUMANS,
Judge.

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33 Assignment of Errors.

Filed in U. S. District Court July 12, 1919.

Come all the defendants in the above styled cause and file this their Assignment of Errors, upon which they will rely upon their appeal from the final decree heretofore entered herein by said District Court.

The said District Court erred in making and entering said decree and in the proceedings had in said cause prior thereto in the following particulars, to-wit:

1. The Court erred in allowing the witness, Phelps, to testify that in his opinion the improvements contemplated would not benefit the road of Plaintiffs.

2. The Court erred in allowing the witness, Phelps to testify that the State Tax Commission in assessing the railroad track took into consideration all elements of value of Plaintiffs' road, except buildings, materials and stores, and pro-rated the same per mile.

3. The Court erred in failing to exclude the testimony of the witness, Phelps, to the effect that the Arkansas Tax Commission arrived at the value of the railroad track by
34 including the intangible or franchise value with the value of the track and right-of-way itself.

4. The Court erred in allowing the witness, Phelps, to testify that the Interstate Commerce Commission valued the main

line and detour of the Plaintiffs within the District at $77,074 or $77,730.

5. The Court erred in its findings of fact contained in the Decree in holding and finding that no direct benefit would accrue to the Plaintiffs by reason of the proposed improvements.

6. The Court erred in its findings of fact in finding and holding that the assessment against the property of Plaintiffs includes the franchises of Plaintiffs.

7. The Court erred in finding and holding that the assessment deprived the Plaintiffs of their property without due process of law.

8. The Court erred in finding and holding that the assessment denies the Plaintiffs equal protection of the law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

9. The Court erred in failing to find that the assessment made against the property of the Plaintiffs did not include the franchise or intangible value of the Plaintiffs' road.

10. The Court erred in failing to find that the assessment against the property of the Plaintiffs was valid in all respects.

11. The Court erred in entering a decree herein in favor of the Plaintiffs, for the reason that said decree is not sustained by sufficient evidence.

12. The Court erred in failing to enter a decree herein in favor of the defendants.

13. The Court erred in entering a decree in favor of
35 the Plaintiffs enjoining the Defendants from enforcing the assessments made.

14. The Court erred in failing to find both the facts and the law in favor of the Defendants.

Wherefore, the Defendants, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, appealing, pray that the decree entered as aforesaid against them may be wholly set aside; that the case between the Plaintiffs and Defendants be remanded to the said District Court with directions to enter a decree herein in favor of the Defendants, and dismissing the bill of complaint herein, and

for such other, further and different relief to which they in equity and good conscience may be entitled.

WILL F. THOMAS, Sheriff and Collector,
Little River Drainage and Levee District of Sevier County, No. 1,
E. W. BEESON,
G. A. HENRY,
FRANK ETHRIDGE,
Directors.
By James D. Head
Their [Solicitors.]

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36 Bond on Appeal.

Filed in U. S. District Court July 14, 1919.

Know All Men By These Presents:

That we, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, and the United States Fidelity and Guaranty Company are held and firmly bound unto the Plaintiffs, Kansas City Southern Railway Company and Texarkana & Fort Smith Railway Company in the sum of One Thousand ($1,000) Dollars, for the payment whereof well and truly to be made, we bind ourselves, heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seal and dated this the 7th day of July, 1919.

Whereas, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No.
37 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, have prosecuted an appeal to the Circuit Court of Appeals of the Eighth Circuit to reverse the decree and judgment rendered by the Judge of the District Court of the United States for the Western District of Arkansas, Texarkana Division, in the said above cause then pending in said court;

Now, Therefore, the condition of this obligation is such that if the above named Defendants shall prosecute their said appeal to effect, and answer all damages and costs if they fail to

make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

WILL F. THOMAS, Sheriff and Collector,
Little River Drainage and Levee District of Sevier County No. 1,
E. W. BEESON,
G. A. HENRY,
FRANK ETHERIDGE,
Directors.
By James D. Head,
Their Attorney.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By H. F. Offenhauser,
Its Attorney in Fact.

Approved by
Frank A. Youmans,
United States District Judge.

July 14, 1919.

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38 Statement of Evidence.

Filed in U. S. District Court August 25, 1919.

Prepared for the purpose of the appeal of the defendants to the Circuit Court of Appeals of the United States for the Eighth Circuit, under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States."

Now come the defendants and present to the court their statement of evidence in compliance with Rule 75 of the "Rules of Practice of the Courts of Equity of the United States", such statement being prepared for the purpose of the appeal of the defendants to the Circuit Court of Appeals of the United States for the Eighth Circuit, said evidence being as follows, to-wit:

Plaintiffs' Testimony.

D. PHELPS, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. State your name. A. D. Phelps.

Q. What position do you hold if any, with the United States Railroad Administration?

A. I didn't understand you.

Q. What position do you hold with the United States Railroad Administration?

A. I am Tax Commissioner for the Kansas City Southern, Texarkana & Ft. Smith, the Midland Valley, Missouri
39 & North Arkansas, and the Joplin Union Depot Company.

Q. Before the Government took control of the railroads what position did you hold with the Texarkana & Fort Smith and Kansas City Southern Railways?

A. I was Tax Commissioner of those lines.

Q. How long had you been Tax Commissioner?

A. Since August 22, 1916.

Q. Is the United States Railroad Administration,—I mean the Government of the United States or rather the President under the direction of Congress, in control of these railroads?

A. It is.

Q. State whether or not the matter of assessment and taxes over both the Kansas City Southern and Texarkana & Fort Smith is under your jurisdiction and has been for a considerable time?

A. Yes, sir, the matter of furnishing renditions to the various tax authorities and the matter of making payment of the taxes is under my jurisdiction.

Q. When did you first get information that the Little River Drainage District of Sevier County No. 1 was demanding taxes from the Texarkana & Fort Smith Railway Co. and the Kansas City Southern Railway Co.?

A. Well, it was about March 7, 1918.

Q How did you get the information?

A. Well, I was at DeQueen checking up the amount of taxes that we were to pay at the paying date, which was April 10th. I was there I believe on the 7th day of March checking up our taxes and it was at that time from an examination of the records in the office of the Sheriff and Tax Collector, I ascertained that these taxes had been levied. That was the first I knew of it.

Q. You are the man that had that business and it would be your duty to look after it? A. Yes, sir.

Q. And you had had no notice of it at all up to that time?

A. No, sir.

Q. How much did you find assessed there for the year 1917, or how much were they demanding of all these roads?

A. $4190.00.

40 Q. How much was the tax on all the other property in the district?

A. The taxes on the other property in the district was $3151.52.

Q. Did you try to pay that to Mr. Thomas, the defendant, the Tax Collector? I mean did you try to pay the other taxes?

A. Yes, sir; and Mr. Thomas informed me that—

Mr. Head: That is objected to.

The Court: Who is Mr. Thomas?

Mr. McDonough: The collector and a defendant.

The Court: The objection is overruled.

Mr. Head: Save an exception as to the defendant Drainage District.

Mr. McDonough: I think in view of Mr. Head's statements it is important for the reason that the statute itself fixes a heavy penalty against the collector if he collects the general taxes without collecting the special taxes.

The Court: The objection is overruled.

A. Well, Mr. Thomas told me that under the law he was not permitted to collect part of the taxes without collecting all of them and that being the case, we would not be permitted to pay our general taxes in the district without paying the taxes of the drainage district.

Q. Did you make report of that to the company or to the legal department, and wasn't this suit instituted soon after?

A. I made report immediately to the legal department and the suit was filed soon after.

Q. After the injunction you paid the general taxes in accordance with the figures that the collector had?

A. Yes, sir.

Q. State whether or not you told him and offered to pay the general taxes and not pay this drainage district assessment?

A. Well, I asked him whether or not we would be permitted to do that. I don't recall whether I really tendered him the money. I don't think I did. I consulted him on that
41 point and asked him whether or not we could do that. I told him we did not feel that the tax was proper in the drainage district.

Mr. Head: I don't think that is competent.

The Court: That just simply states what passed between them. He may answer.

Q. Go ahead and tell [was] passed.

A. As I stated, I told the collector that I did not think the taxes in the drainage district was a proper tax. I asked him whether he would cut that out and allow us to pay the rest of the taxes that we owed and leave this drainage tax to be settled in court. And he told me that that couldn't be done; that it was necessary to pay it all or none.

Q. Do you know what the total amount assessed against the property of the Texarkana & Fort Smith Railway Co. and the Kansas City Southern Railway Co. under that proposed Drainage District was?

A. You mean within the limits of the District?

Q. The total amount for the whole number of years? What you have given was for only one year?

Mr. Head: I object to that question if Your Honor please. There is no human being in the world outside of the Board, and I don't suppose they can tell what they are going to levy another year, and nobody can tell what the taxes will be.

The Court: If he wants to testify what it will amount to at the same rate for a certain number of years, it would be just a method of comparison.

Mr. Head: Save an exception.

Q. Was that the amount that was to be levied each year?

Mr. Head: I object to that.

The Court: I don't know how the witness could testify what any other levy would be unless the law provides that it is a matter of computation. Then if he made the computation.

Q. Did you ascertain what amount would be assessed against the property of the Texarkana & Fort Smith
42 and Kansas City Southern for other years after 1917?

Mr. Head: I object to that if Your Honor please, for this reason: That that Board is the party that is going to levy those taxes and they have the right to levy up to 6 per cent, but the Board couldn't tell one year what it is going to levy next year. The valuation on the land is sure to be and will be raised; it will be worth more and they will be raised.

Mr. McDonough: I am simply asking him if he has the information.

The Court: The point is, what methods were produced for ascertaining this.

Mr. McDonough: I asked him if he had any information.

The Court: But the source of his information would be necessary.

Mr. McDonough: Then I would inquire of that.

The Court: All right.

Q. Do you have any information as to what would be levied each year? A. No, sir; I had none.

Q. Do you know whether there has any been levied for 1918, and if so, how much?

Mr. Head: I object to that.

The Court: He may answer.

Mr. Head: Save an exception.

A. No I don't. We don't examine the tax books in Arkansas until later in the year, the taxes not being collected until April 10th. We very rarely examine the tax books until February or March.

Q. How much mileage has the plaintiffs, and by plaintiffs, I mean the Texarkana & Fort Smith and Kansas City Southern, in the drainage district, main line, side track and including the detour?

Mr. Head: I object to that unless he shows first that he knows and how he knows.

The Court: He may answer.

43 Mr. Head: Save an exception.

A. Well, they have 2.1 miles of main line, that is, of the old main line. Then they have .62 miles of main line of the Neal Springs detour, and they have .89 miles side track.

Q. What is the width of the right of way?

A. Well, the right of way in general is 100 feet wide. At points where for any special reason it is necessray to have it wider, as for instance yard grounds or depot grounds, stock yards or anything of that sort, it is whatever width the necessity requires.

Q. Taking the entire right of way there of the plaintiffs, how much acreage is there in that right of way in the so-called improvement district?

A. 40.43 acres, according to my information.

Q. Did you take the description and figure out the amount of acreage in the entire district, the amount of acres?

A. No, I didn't do that personally. I secured the information in regard to the amount of acres from our Engineering Department. They furnished me with the amount of acreage in the district.

Mr. Head: Now if Your Honor please, I move to exclude his testimony as to the number of acres in the district.

The Court: He has not stated yet.

Mr. Head: Yes, 40.43 acres.

Q. Mr. Phelps, what study or investigation, if any, have you made about the matter of benefits to be derived by a railroad company from drainage districts?

A. Well, I have given the matter a great deal of study during the past more than two years that I have been handling the taxes. I have made a special study of questions of valuations and benefit and all other questions incident to taxation and assessments. I have read everything I could on that subject and tried to inform myself just as fully as possible on all phases of taxation matters.

Q. You are familiar with where this road goes through this improvement district, are you? A. Yes, sir.

44 Q. I wish you would state whether or not in your opinion the property of the plaintiffs is in any way [benefitted] by the construction of these drains and levees and such other improvements as this drainage district may make?

Mr. Head: Objected to as calling for a conclusion of the witness when he has not shown himself to be an expert.

The Court: Objection is overruled. He may answer.

Mr. Head: Save an exception.

A. I would say no, that in my opinion the property of the plaintiff would not receive any benefit from this improvement.

Q. Have you the copies of the certificates from the Tax Commission showing the amount of assessments of the property of the plaintiffs within the improvement district?

A. I have them in my office; I haven't them here.

Q. Have you copies with you showing the amount?

A. No, sir.

Q. Do you know the amount of mileage?

A. Yes, sir; I have that information.

Mr. Head: Just a minute, Your Honor, I have got the statement from the Tax Commission.

Mr. McDonough: Q. Please state, Mr. Phelps, what per cent it is that the Board of Directors assessed against the property of the Texarkana & Fort Smith and the Kansas City Southern for the year 1917.

A. They assessed a straight ad valorem tax of 6 per cent against the assessed valuation.

Mr. Head: Now if Your Honor please, I object to that if he means to imply by that that we have assessed anything against the franchise because that is not the best evidence. In fact, we have not; we have only assessed against the track itself.

The Court: Objection is overruled.

Mr. Head: I move to exclude his statement because the record is the best evidence, the figures themselves being [accessable] and authenticated copies thereof being obtainable.

45 Mr. McDonough: Is this an authenticated copy?

Mr. Head: I am willing to take it for the tracks but it does not include any franchises.

The Court: The objection is overruled. He may answer. It strikes me that will be a matter to be determined. I suppose there is no dispute with reference to the amount that is assessed against the railroad in some form?

Mr. McDonough: I think not.

Mr. Head: Not the total amount.

The Court: Now then as to what it is assessed against will be a matter of law.

Mr. Head: Your Honor, can't tell what it is assessed against unless you get the valuation in.

Mr. McDonough: That section I read it seems to me determines that absolutely. That section 5.

The Court: Does the board of railroad commissioners certify down to the counties more than one valuation?

Mr. Head: Yes, sir; they certify down the total assessment including the franchises. This act requires that they certify down the separate valuation to the Board of the track and right of way itself.

Mr. McDonough: Here it is I believe. The Board of Directors shall have power and it is hereby made its duty to

assess and levy annually a tax or valuation as it shall appear each year upon all lands, terminals, telephones and telegraph lines upon the railroad tracks—

(Reads Act)

The Court: But the point I was getting at is this: After two assessments, that is, two valuations sent down by the Railroad Commission, that it ought to show upon which one of those valuations this particular levy is made.

Mr. McDonough: Yes, sir; I will call upon the defend-
46 ants to produce those if they have got them in their possession.

Mr. Head: I am perfectly willing to produce the copies. I haven't got the certificate of the Secretary of State.

Mr. McDonough: Have you got the one that was sent to your Board of Directors?

Mr. Head: No, I haven't.

Q. Where did you get it Mr. Phelps?
A. I have just the same thing that Mr. Head has. It is a certificate furnished by the Secretary of the Arkansas State Tax Commission showing the assessment against the property.

Mr. McDonough: I ask that Mr. Phelps be permitted to go ahead and make the explanation.

The Court: He may make the explanation and if it appears that it is improper it can be excluded.

A. In arriving at the valuation of railroad property the State Tax Commission took into consideration five different elements of value. That is to say, the main track at so much per mile; side track at so much per mile; rolling stock at so much per mile; the buildings, materials and store, now those items of building material and store, they allocated to the School District and municipality where they are situated. All other elements of value are pro-rated at so much a mile, but the buildings, materials and stores. All rolling stock on both of the improvement districts, or assessment that is made on both of the improvement districts is against main track and side track at so much a mile. Now the explanation that I wanted to make in connection with that matter is simply this: The State Tax Commission in valuing a piece of railroad property undertake to value the whole property as a unit.

Mr. Head: I object to that if Your Honor please.

The Court: I think that is a well known fact. I don't see how he could do otherwise under the law. He may answer.

Mr. Head: Save an exception.

47 A. Now these sub-divisions of that value are necessarily to some extent arbitrary. The value of the railroad and all its franchises, its intangible value, franchise value, are included in the total of all these items. We know we ascertained what the rolling stock is worth per mile. The custom all over the country is to take the actual value of the rolling stock and where it is an interstate road it is pro-rated to the different states on the basis of the total miles. But now the total value of this road must necessarily be included in the sum of these five items. And the point I want to call attention to is that this element of franchise or intangible property must be somewhere in these five items. The Tax Commissioner I don't think would undertake to deny that they assessed the franchise value. In arriving at the total value they usually require me to show a statement of net earnings. They take that into consideration in arriving at the value of the railroad. Necessarily when they do that they include therein an element of earning power. Now when they apportion that intangible value out it must appear somewhere. It doesn't appear in the materials and stores because that just includes a few tools that it is easy enough to be ascertained what their value is. It don't appear in the buildings; we know what they cost; we know what their present value is. There is no chance of any intangible value. It don't appear in the rolling stock. The rolling stock is simply figured up on the total value of rolling stock and apportioned to each state. Now then we have only two items left, side tracks and main line. Now this intangible value that I have been speaking about must appear there because it can't appear in anything else. Therefore it has always seemed to me that these intangible values are under the guise of the value of the track. Now by way of understanding just what I mean by that, the valuation section of the Interstate Commerce Commission valued the property of the Kansas City Southern on June 30, 1914; they did that by the inventory meth-

48 od, that is, by figuring up the measurements of the different items that go to make the railroad track. Now then from the records of the valuation of this I. C. C.—

Mr. Head: I object to that as the records are the best evidence.

The Court: This is simply a means of comparison. I think the witness is testifying more to his opinion as an expert on this particular matter. I think it is competent for that particular purpose.

A. Now taking this 2.10 miles of main track and this .62 miles of Neal Springs detour, and applying the results obtained by the I. C. C. to that particular locality we find that the items of engineering, line, grading the approaches, trestles and culverts, ties, rails and other track material, ballast, track laying and surveying, fencing, crossing signs and telegraph and telephone lines amounted to the sum of $77,074.00, and applying to that sum the percentage of what we call the condition per cent or the condition of the property with reference to this cost of reproduction, it was ascertained that this particular 2.10 miles of track, and .62 miles of Neal Springs detour on the basis of the valuation ascertained by the I. C. C. plus the cost of all additions and betterments since that time, amount to actual value of $77,730.00. Now, it is a well known fact that the Arkansas Tax Commission assesses property in this state on a basis of fifty per cent of its actual value. Therefore, their assessment of $69,910.-00 against the same property that the I. C. C. found to be worth $77,730.00—

The Court: What do you mean by the I. C. C.?

A. The Interstate Commerce Commission. Taking the assessed valuation of the Arkansas Tax Commission, $69,-910.00, multiplying it by two, which shows the full one hundred per cent value, we have $139,820.00. Now, then, the Arkansas Tax Commission has evidently regard the full value of the property in question as $139,820.00. Now the
49 Interstate Commerce Commission say that the actual value of these tangible elements going to make up this railroad track in this particular district, amounted to $77,-730.00. Now there is a difference of $62,090.00 I can't account for that difference on any other theory than it is composed of intangible elements.

The Court: You have got the valuation of the Interstate Commerce Commission?

A. Yes, sir.
Q. And you have given the amount of it, $77,730.00?
A. Yes, sir.
Q. Now then, you have made some statement about multiplying that by two?

A. The State's assessed valuation in the district was $69,910.00 which was supposed to be one-half of its actual value.

Mr. McDonough: In other words, the property within the Improvement District as assessed by the Interstate Commerce Commission is $77,730.00?

A. Yes, sir.

The Court: Not as assessed, Mr. McDonough, as valued?

Mr. McDonough: Yes, as valued.

Q. The same property as valued for taxation,—as valued by the Arkansas Tax Commission was $69,910.00?
A. Yes, sir.
Q. The latter was upon a fifty per cent basis?
A. Yes, sir.
Q. Hence the value as fixed by the Arkansas Tax Commission is double that sum? A. Yes, sir.

The Court: I understand this to be this witness' inference?

The Witness: That is exactly what I meant to say.

The Court: It is his conclusion that that being the value fixed by the Arkansas Tax Commission and the basis is fifty per cent, it follows that the value is twice that?

A. Yes, sir.

Mr. McDonough: Isn't it true that all over Arkansas the tax officers assess property at fifty per cent of the value?

A. Yes, sir; that is the universal practice.

50 Mr. Head: I object to that as not being competent manner of proving how property is assessed.

Mr. McDonough: I think it is admissible because it is done throughout the entire state.

The Court: I don't know how else it is to be proved. The objection will be overruled.

Mr. Head: Save an exception.

Mr. Head: Now, if Your Honor please, I want to move to exclude the testimony of this witness with reference to the manner in which the Arkansas Tax Commission arrives at the actual value of the railroad tracks in the district, for the reason that that proof is incompetent, irrelevant and imma-

terial, and for the further reason that the law fixes a method by which they shall arrive at the valuation of the railroad track.

The Court: I understand that that testimony of the witness is to this effect. He refers to the divisions which in his opinion are made, and then he deduces certain inferences from that which are merely matters of expert opinion on his part. The motion will be denied.

Mr. Head: Save an exception. If Your Honor please, I desire to move to exclude that testimony as it is not the best evidence, as the records of the Commission show those things.

The Court: The motion will be denied.

Mr. Head: Save an exception.

Mr. McDonough: Q. Mr. Phelps, if you had not finished your statement when I interrupted you with the questions, I wish you would finish it.

A. That is all I wish to say on that point.

51 Cross-Examination

By Mr. Head:

Q. Mr. Phelps, in 1917 did you pay the taxes assessed against the railroad in Sevier County, all of the taxes?

A. Yes, sir; I paid the taxes assessed for the year 1917 on April 10th.

Q. I am talking about 1917. Didn't you pay the taxes assessed against the railroad for 1916?

A. Yes, sir; I think I did.

Q. Didn't you pay these Levee District taxes in 1916—of 1916 in the year 1917?

A. No, sir; according to my recollection there was no taxes levied for the benefit of the drainage district.

Q. Didn't you in 1916 pay the taxes for the railroad levied in Sevier County for all purposes?

A. I wasn't in charge of the tax matters at that time. The taxes had been paid for the year, that is, paid in 1916 for the year 1915, before I took charge of the matter.

Q. You don't know then whether the Railroad Company in 1916 paid the levee tax assessed against the property in the district or not?

A. No, sir; I couldn't answer that question, Mr. Head.

Q. Did you investigate to find out whether the taxes had in fact been paid before you came in as commissioner?

A. No, sir; I did not.

Q. Did you tender to the collector of Sevier County the amount in cash, or otherwise, that is, or its equivalent, for the tax assessed against the railroad in 1917 for general State, County and school purposes?

A. Well, I did not tender it to him until after I had filed this injunction suit.

Q. Well, you paid it then?

A. I tendered it and paid it in the form of a voucher. I didn't make any formal tender to the sheriff of the taxes that we deemed were due, that is as a formal tender.

Q. You made no formal tender of the taxes?

A. I simply relied on his statement that he could not accept it and that was all there was to it.

52 Q. Did you make a formal tender of taxes admitted to be due to the collector of Sevier County before the filing of this proceeding? A. I did not.

Q. Now you have had how many years experience as tax commissioner? A. Well, I have had a little over two years.

Q. Now in that time have you ever acquired any knowledge of engineering?

A. Well, not very extensive knowledge of it. I come in contact with the work of the Engineering Department a good deal and necessarily I have learned some things about it.

Q. Can you figure the volume of water that ordinarily goes through that district where the levee is proposed to be put to keep it out?

A. No, sir; I am not competent to figure that.

Q. Do you know whether the railroad there is subject to overflow in that district, of your own knowledge?

A. Well, I have never seen it. I have been acquainted with that railroad in that locality for a good many years. I have never seen it under water.

Q. Did you know that in 1915 two bents of that trestle inside the district between the bridge and Neal Springs went out by water?

A. No, sir; I can't say that I knew that.

Q. Do you know whether or not waters have been known to go through that district even higher than the flood of 1915?

A. I am not prepared to give any evidence on that point.

Q. If a levee were built, Mr. Phelps, which would keep the water off there, assuming that water did in 1915 take out two bents of that trestle, and that the trestle has not been raised, and if this levee was four feet higher than the water got at that time, would you say that the railroad would get any benefit from it?

A. I would say that that was a matter that I think the engineering department of the railroad was best competent to deal with, as to how they will protect the property from floods.

Q. Well, if somebody else comes along and voluntarily protects it, it saves it that much, doesn't it?

55 A. I wouldn't care to express an opinion.

Q. You have stated that it wasn't any benefit?

A. Yes.

Q. I will ask you the simple question if a levee were built that would protect the railroad so the bents would not go out, assuming that they have in the past, if in your judgment you would consider that a benefit to the railroad?

A. I should think not.

Q. You think it would benefit the railroad not to have any protection at all?

A. I think the benefit of the railroad is one that should be left in charge of the officials. I don't think they should go out—I think it should be up to the engineering department to say.

Q. So then, in stating that there were no benefits to this property, you qualify that by stating that you know nothing of engineering and you know nothing about the protection that will be given to this property, and that you consider whatever protection may be given it is properly a question for the railroad?

A. I do not think it is competent for anyone else to form plans for the protection of the railroad company's property, and any plans they would form off-hand, would not be for the benefit of the property because they would not be formed by the persons best qualified.

Q. Your statement that there wouldn't be any benefits is upon this conception, that is, that the railroad should do it itself?

A. The question of benefit as I would be competent to testify on that would be under the proposition that is alleged there in your petition, that the property of the railroad company would be [benefited] in an economic way by the improvement, that is, by the growth of the crops and the additional freight that would be made. I am very frank to confess that I am not an engineer and I am not testifying as an expert along that line, but I have given some thought to benefits that would be derived by reason of the growth of crops and the addition to the tonnage—

Mr. Head: I didn't ask you that.

54 (Witness continuing) I think I would say there was absolutely no benefit to be had.

Mr. Head: If Your Honor please, I move to exclude the answer of the witness as not being responsive.

The Court: The motion is overruled.

Mr. Head: I save an exception.

Q. Then you don't know what benefits will be derived?
A. I don't know of any benefits whatever.
Q. You don't know that there wouldn't be any, do you?
A. I will say that it is my opinion there would not be any.
Q. On what do you base that?
A. What I said before on the matter of the protection of the property I would be willing to rely on the officials of the company taking the test and most economical steps to do that. By reason of the growth of tonnage and the opening up of the country of farming development I would say there would not be a benefit in the sense of what we understand benefits. In other words, whatever benefit by reason of additional cultivation would be such as would be common to the whole community and not such as would be particular to this particular property. That is what I mean by it would have no benefit.

Mr. Head: I didn't ask that.

The Court: Just answer the question.

A. Well, I will say that I do not think the railroad would receive any benefit.
Q. If that land did not overflow there would be no reason for a trestle there?
A. I would not feel like answering that question. As I said, I am not an engineer.
Q. You have ridden over the railroad a good deal?
A. Yes, sir.
Q. Do you know of any other place in which the railroad uses trestle work where they can use earth for their track?
A. Yes, I think that would be the common sense way of looking at it.
55 Q. It would be a better track, wouldn't it?
A. I think anyone would admit that trestles are not maintained as a matter of choice on the part of the railroad.
Q. Why do they maintain them? As a matter of necessity?

A. Well, yes.

Q. Then if this railroad by reason of the building of this levee could you get rid of that trestle, would it be any benefit?

A. Not necessarily.

Q. Why?

A. That might not be the safest way to get rid of the water. I wouldn't think that that was the best way to deal with the situation or the railroad company would have built it that way.

Q. I asked you if this levee was built and by means thereof this trestle could be eliminated entirely and dirt or earth substituted therefor, if the railroad would not receive a benefit by cutting out that trestle?

A. I don't think so. If you will permit me I will say why.

Q. Well, why?

A. Well, I think it might be open to a danger if the levee were built and the trestle eliminated, if it should give way the water would all come down in one volume and wash away the railroad. I am no engineer. That is just my idea about it. And for that reason I don't think it would be a benefit.

Q. Assuming that the levee might break. If the levee held there might be a benefit?

A. I couldn't say. There might be other elements. I don't think that the building of the levee would be any benefit in any sense.

Redirect Examination

By Mr. McDonough:

Q. Mr. Phelps, did the commissioner Dr. Henry, or any of the others, give you any notice to come before them for any hearing, or anything of that kind?

A. They did not.

Witness excused.

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56 JAMES B. McDONOUGH, being first duly sworn on behalf of the plaintiff, testified as follows:

[—]

My name is James B. McDonough. At the time and for a number of years before this suit was brought I represented the Kansas City Southern Railway and the Texarkana & Fort Smith Railway in Arkansas and Oklahoma. Matters of this kind were under my jurisdiction, so far as any legal questions arose, such as notice, and things of that kind. No notice of any kind was given to me about the assessment and collection of these taxes. I received it first from Mr. Phelps. As he stat-

ed on the witness stand, he had received it when he was down at DeQueen and notified me at once. Now I want to tell my advice to him, Mr. Head, so that you can object to it if you want to.

Mr. Head: I object to that.

The Court: Why do you think that competent?

Mr. McDonough: I think it competent on the ground that it showed the reason for not making a tender.

The Court: You can state whether you advised him to make a tender.

(Witness continuing) I advised him that as Mr. Thomas had refused to collect, it was not necessary for him to make an actual tender. Mr. Thomas advised him that he would not receive any part of the taxes unless these drainage taxes were paid along with the others.

Mr. Head: I move to exclude that as being incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Head: We save an exception.

(Witness continuing) I wish to make one further statement that the matter of paying similar taxes for the year, I cant tell,—arose with the predecessor of Mr. Phelps, and those were taxes that were for the preliminary expenses as I recall it, for the original district as organized under that act.

Now I would like to state what my advice to the plain-
57 tiffs was upon that question.

Mr. Head: I object to it if Your Honor please.

The Court: I do not see how it is competent.

Mr. McDonough: I will offer it later if counsel on the other side goes into the question of our paying those taxes. I want to show the reason for paying them.

Witness excused.

A. Leckie, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. What is your name? A. A. Leckie.
Q. Where do you live? A. Texarkana.

Q. What business are you in?

A. Division Engineer of the Texarkana & Ft. Smith Railroad Co.

Q. How long have you been in the employ of the Kansas City Southern and the Texarkana & Fort Smith together—both of them.

A. Since January 1911.

Q. What position did you hold prior to the one you hold now?

A. I was Division Engineer on the Terminal Division at Kansas City.

Q. Are you a civil engineer by profession? A. Yes, sir.

Q. How many years have you been engaged in that profession?

Q. Since 1901,—seventeen years.

Q. Are you familiar with the line of road of the Kansas City Southern and the Texarkana & Fort Smith in the neighborhood of Neal Springs, both north and south of Neal Springs?

A. Yes, sir.

Q. How long have you been familiar with that railroad?

A. About six or seven years.

Q. Are you familiar with how the road is constructed right there at Neal Springs and immediately south?

A. Yes, sir.

58 Q. Describe how it is constructed there?

A. Starting at Neal Springs and coming south the road is on a fill possibly averaging fifteen to eighteen or twenty feet high, and just south of Neal Springs a short ways there is a bridge about five hundred feet long, and the fill continues on south to Little River.

Q. What kind of bridge is that?

A. The bridge just south of Neal Springs?

Q. Yes. A. It is a pile trestle.

Q. About how high is the track there above the surface of the ground?

A. Fifteen feet.

Q. To your knowledge has the track of the railroad company ever overflowed there?

A. Not to my knowledge no.

Q. Have you ever been there when there was high water so that the water ran through under that trestle?

A. I have not.

Q. That trestle is something over five hundred feet, is it?

A. Yes, sir.

Q. Then going south of that trestle there is a fill, is there?

A. Yes, sir.

Q. How far does the fill extend?

A. All the way to Little River.

Q. Then what is there across Little River?

A. A steel bridge across Little River.

Q. About how long is that bridge?

A. I would say about 350 or 400 feet long.

Q. Describe the Little River there as to whether it has banks or not. What I want to know is there any—what kind of banks has it? Just describe them.

A. The north bank is what might be termed a low bank. It is lower than the south bank of the river.

Q. Now how much lower?

A. I would judge about fifteen feet lower than the south bank.

Q. Are you familiar with the topography of the country around Neal Springs and Horatio including the area of this district?

A. Yes, sir.

59 Q. Have you figured up the acreage in this district as provided by the act of 1917?

A. I have not, no, sir.

Q. Have you been over this drainage district or part of it?

A. I have been over a considerable part of it, yes sir.

Q. Do you know whether or not the rails of the railroad company there are above high water at Neal Springs and south on to this trestle, along in there?

A. Well, I don't know. I have never been there.

Q. Did you ever see the water over the rails there?

A. I have not.

Q. You never made an examination of that to ascertain whether it was above high water, yourself?

A. No, sir.

Q. Has there been constructed a highway called, I believe the Jefferson Highway along by Neal Springs on the west side of the railroad track?

A. Yes, sir.

Q. Where does that cross Little River?

A. I don't know. I have never been out there.

Q. It passes along by Neal Springs, does it?

A. Yes, sir.

Q. Does it cross the detour there, that highway, the new line of the Kansas City Southern?

A. Yes, sir, it does.

Q. Mr. Leckie, I wish you would state whether or not you have taken the description as given in the act of the legislature and made an effort to see whether there was any line of hills following from where that line comes back from Little River up to Horatio?

A. I have, yes sir.

Q. Is there any line of hills there?

A. Not the line of the hills that could be termed a continuous line of hills.

Q. I wish you would describe to the court telling exactly what you found and to what extent you went over it.

A. Will it be all right to refer to this map?

Q. Yes, sir; you may refresh your memory by reference to maps of memoranda.

60 A. The east boundary line of this district leaves the north bank of Little River between sections 10 and 11, Township 11 South, Range 31 West, and continues north on that line to what is called the line of the hills, and it crosses the bottom and hits the hills on the line between Sections 22 and 23, in Township 10 South, Range 31 West, and at that point the bottom land is very flat and the hill rises quite rapidly. Then as you go—as you attempt to follow this line of the hills northwest just a short distance west of this line between sections 22 and 23, there is a small draw that breaks the line of the hills and allows the bottom land to get back into the hills a ways, and then following on Northwest about on the center line of section 22, the north and south center line, you hit another draw that breaks the line of the hills. Then continuing on northwest into section 16 you strike what is called Coolie's Creek, and this is quite a good sized creek and has a valley that would average at least a half mile wide and appears to go in a northerly direction as far north as I went, say on the section at the section corner between sections 3, 4, 9 and 10.

Q. That is about two miles and a half north of Coolie's Creek?

A. About a mile and a half north. Now at that point the public road is about on the section lines between 3 and 10 and between 4 and 9, running east and west, and there is a considerable bridge over this creek at that point. Then as you continue on northwest—

Q. Before leaving that, there is a valley in there that is about half a mile in width, as I understand you?

A. Yes, sir.

Q. And that valley runs northward generally?

A. Yes, sir.

Q. How far north?

A. I don't know but judging from the appearance of it i must be several miles on further north than this bridge.

A. Continuing on northwest when you reach a point nea the northwest corner of section 16 there is another small draw that comes in there.

61 Q. Comes in from the north? A. Yes, sir.

Q. How wide is that draw?

A. This draw is a small one that would be possibly two or three hundred feet across.

A. Now then when you reach a point a little west of the center of section 8 Clear Creek comes into the bottom. Now this creek is larger than Coolie's Creek and I would say that the valley is three quarters of a mile wide.

Q. In what direction does that valley go?

A. In a northerly direction.

Q. Could you tell how many miles it goes?

A. Well, at a point just north of the center of section 5, which is directly north of 8, a creek called Blue Creek flows into this Clear Creek and the valley at that point separates and follows Clear Creek to the right, or east, and Blue Creek to the left or west, and I would say that the valley of those two creeks at that point would be several miles in extent.

Q. Go ahead.

A. Now as you go over to the section corner between section 1, 6, 7 and 10, there is a draw breaking into the bottom and this draw leads off in a northeasterly direction. It is possibly two or three hundred feet wide and extends back up into the hills possibly a half mile. Those are the principal draws that break up the line of hills.

Q. Is there any line of hills running in that direction so that you can take a surveyor's piece or instrument and run out a line along that line of the hills running in a northwesterly direction?

A. There is not.

Q. At the line between sections 22 and 23 state whether or not you and I and Mr. W. W. Milwee were there and examined where it was said that line came? It is near the corner of 22, 23, 26 and 27, a little north of that corner.

A. What was the question?

Q. Whether or not you and I and Mr. Milwee examined that place?

A. Yes, sir.

62 Q. He is a citizen that lives up there?

A. Yes, sir.

Q. State whether or not at that point there is not a gradual upward drain that goes still on north of a quarter of a mile or a half mile, or something like that?

A. There is.

Q. Doesn't the valley turn around to the northeast from the top of that rise?

A. Yes.

Cross-Examination

By Mr. Head:

Q. Mr. Leckie, in giving this heighth of this dump from Neal Springs down to the river, did you measure the heighth of that dump to see what it was?

Mr. McDonough: I want to introduce as exhibit 1 to his deposition the map identified by the witness.

BLUEPRINT

TOO

LARGE

FOR

FILMING

Q. Did you measure the dump which you said w
fifteen or eighteen feet high?
A. No, sir; I did not measure it.
Q. As a matter of fact, don't you know that it does n
exceed 11 feet at any point?
A. That is my opinion I was giving you.
Q. Now you state that the steel bridge was 350 or 4
yards wide across Little River?
A. No, sir.
Q. I mean feet?
A. I stated it was about 350 or 400 feet.
Q. As a matter of fact, it is only 250 feet, isn't it?
A. I gave my opinion of it.
Q. You never measured it? A. No.
Q. Now in what way did you attempt to determine whe
this line of hills was? You said it could not be determine
In what way did you attempt it?
A. I went up there and went over the grounds and looke
the hills over.
Q. Did you take the levels of the ground? A. Yes, si
Q. Did you attempt to find out where the high water mar
was?
A. No, sir.
Q. Did not take any of the high water levels?
A. No, sir.
Q. It is possible to take those levels and determine whe
the waters from the river get back there?
A. It is possible, yes.
Q. You can do that by the water marks and taking th
levels?
A. You can do that possibly by high water marks, an
by the evidence of the people that live there, where the hig
water has been.
Q. That is ordinarily done by an engineer taking thos
things into consideration?
A. It is not ordinarily done; it could be done.
Q. You knew the purpose of this district was not to pro
tect from the water of those various branches, but to pro
tect from the overflow from the river?
A. I don't know as I knew the purpose of the district.
Q. You don't know whether it was proposed to pro
65 tect from the water from the various branches or fro
the river?
A. In my opinion you have got to protect the line regar
less. You have got to take into consideration where all thos
creeks are, what you are going to do with it.

Q. Those creeks that you mentioned coming in there at various points, do you know whether where they come into the line of the district are above the high water mark of overflows from Little River, whether the elevation of the creeks themselves at that point are above the high water mark, or at the high water mark of the back waters, or overflow rather, from Little River?

A. The creeks if they go far enough, of course, would be below the high water mark.

Q. I am asking about where the creeks come into the boundary of the district?

A. I don't know where the district commences.

Mr. McDonough: I want to call attention to this: That there is no reference in the statute to high water marks, I am not objecting to this testimony, but there is no reference to high water mark.

A. I said I did not know where the district commences because it was impossible to locate it. That being the case your description as to where you mean is not definite enough for me to answer the question.

Q. Didn't you tell the court a moment ago that it was possible for an engineer by taking levels and by taking evidence of high water marks, and the testimony of citizens familiar with it, to trace out the line where the land is above overflow from Little River?

A. Yes, I told the court—

Q. Assuming that has been done and assuming where the point that these creeks come into the district, that those are the lines of the district, do you know whether or not at that point the surface of the land is above high water mark?

A. Taking into consideration your assumption and the fact that I did not establish any high water marks, I
66 don't know.

Q. You did not undertake then to make a survey taking the levels and taking the evidences that you found of high water marks to establish where the lines of the district would be?

A. No, for the reason that this description of the district says "line of the hills". It doesn't mean high water marks.

Q. This statute says following along the line of—

Mr. McDonough: The act of 1917 is entirely different Your Honor.

Q. Thence north to the line of the hills which is entirely above overflow. Now you know what entirely above overflow means? A. Yes, sir.

Q. That means above the highest water mark known?
A. Well, I suppose that is what it means, yes.
Q. You could have determined that if you had wanted to?
A. I don't know whether I could or not.
Q. Well, you stated a while ago that it could be done?
A. That all depends.
Q. Upon what?
A. Upon what high water mark that you were talking about.
Q. That would establish it definitely, wouldn't it?
A. No, the word definitely is not well taken because the high water mark can never be established very definitely on land as irregular as that land is up there.
Q. You didn't attempt to do it? A. No, sir.
Q. You don't know whether it could have been done or not, if you did not attempt to do it?
A. I have my own opinion about that, yes.
Q. Now these valleys that you have testified to with reference to these little streams or breaks coming into the hills on the north side. You don't know whether any of them are above the high water mark of overflows from Little River, do you? A. No, sir.

Q. At the points that you have mentioned heretofore
67 as the high water mark? A. No, I don't.

Re-direct Examination

By Mr. McDonough:
Q. Mr. Leckie, I gave you a copy of this description from the act, did I not? A. Yes, sir.
Q. And that says after— I will begin in the middle of the description in order to get the one I want to ask. "Thence east and south along the bank of said river to where it intersects the line between sections 10 and 11, Township 11 South, Range 31 West, thence north to the line of the hills which is entirely above overflow". Did you find any line of the hills there except as you have described it heretofore?
A. No, sir.
Q. It isn't said in that description is it, that you are to go to high water mark? A. No, sir.

Mr. Head: I object to that. The act shows for itself.

The Court: It may stand. Of course, the act will speak.

Mr. Head: I save an exception.

Q. Does it say also that the line of the hills must be right at high water mark, or does it say thence north to the line of

the hills which is entirely above overflow. Now how far above overflow you can't state, can you, as an engineer?

Mr. Head: I object to that. The quotation made there from the act is not correct.

Mr. McDonough: I am as near as I can. The act speaks for itself.

The Court: As I understand the question, it is applying the act and that is a matter of opinion. The objection is overruled.

Mr. Head: Save an exception.

Q. You may answer then, Mr. Leckie, on that proposition and applying that act, whether or not there is any statement in there as to how far above overflow you are to go when you locate a line of hills?

No, sir; there is no statement.

68 Mr. Head: I object to that, if Your Honor please, as incompetent, irrelevant and immaterial, the statute being very plain.

The Court: I don't know, Mr. McDonough, what you are trying to get at. My understanding is that you are calling the witness' attention to the provision of the statute and then asking him as an engineer whether with those data as indicated in the statute, a line can be astablished by an engineer.

Mr. McDonough: That is what I am asking him.

The Court: I think that is proper. There is no question about what the statute provides. Taking its provisions and applying them, then ask the witness whether a line can be located.

Q. Taking the provisions of the act, being the language which is in the act itself, and which you have before you, state whether or not then it is possible to run a line definitely with that description? A. I don't think so.

Re-cross Examination

By Mr. Head:

Q. It would be possible to run a line with that description if you observed in connection with it, the high water marks that you could see with your eyes, and also taking into consideration the statements of parties living in the country that knew where the high waters went?

A. If you would use your observation and on testimony of people who had seen the high water, it would be possible to establish a contour which would be the high water mark.

Witness excused.

J. M. WEIR, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. Where do you live Mr. Wier? A. Kansas City, Mo.

Q. What is your profession? A. Chief engineer.

69 Q. Of the Kansas City Southern? A. Yes, sir.

Q. Since the United States has taken over the operation of the road have you other duties than those going with the Kansas City Southern? A. Yes, sir.

Q. What others?

A. Midland Valley, V. S. N. P., Missouri & North Arkansas, K. C. M. & O. and H. E. & W. T.

Q. How much experience have you had Mr. Weir as civil engineer especially relating to your work in connection with the construction and maintenance of railroads?

A. About twenty years.

Q. How long have you been with the Kansas City Southern Railway Company?

A. I came with them in June 1916.

Q. Your jurisdiction in connection with that company takes in the Texarkana & Fort Smith Railway also?

A. Yes, sir.

Q. Are you familiar with the location of the line of those companies at Neal Springs and in that neighborhood?

A. Yes, sir.

Q. Are you familiar with the location of the Improvement District referred to here, being the drainage district shown on the map which is Exhibit 1?

A. I am where it is close to the railroad. I have never been out in the east part of it.

Q. Do you know where it crosses on this exhibit near the lines of railroad so shown? A. Yes, sir.

Q. And the bridge across Little River is shown also down there? A. Yes, sir.

Q. Now assuming generally that that district runs as far east as between sections 34 and 35 on this map, and then runs down to Little River generally and includes the territory from that eastern line northwest up to and taking in the mileage referred to of the plaintiffs in the case, the Kansas City South-

ern and the Texarkana & Fort Smith, state whether or not in your opinion the construction of ditches and drains for the purpose of draining those lands down in here, will in any way benefit the Kansas City Southern Railway Co. and the Texarkana & Fort Smith Railway Company?

70 A. My opinion it would not benefit them at all.

Q. Have you in connection with your duties as civil engineer on railroads and with these companies, and also with other companies with which you are connected, given this special study of benefits from local improvements?

A. Yes, sir.

Q. As well as had experience thereon? A. Yes, sir.

Q. You have both given it study and had experience?

A. Yes, sir; both.

Q. And you have given it as your opinion that no benefit would come to these plaintiffs by reason of that construction of these drains?

A. None at all; it probably would be a detriment if anything.

Cross Examination

By Mr. Head:

Q. Mr. Wier, do you know where the levee is proposed to be built by the district to the west of the railroad?

A. No, I don't know that I do, any more than what is set up in the act.

Q. Well, the act doesn't fix the elevation of the levee?

A. I don't really know; I thought it did.

Q. Then if that levee is high enough and broad enough to absolutely keep any water from Little River from coming on to your railroad track at all, would not that be of a benefit to your road? A. I wouldn't hardly see how.

Q. Do you know how long that trestle has been built there that is just south of Neal Springs?

A. I understand it was built there during the construction of the railroad.

Q. Do you know how many times it has been replaced?

A. No, I don't.

Q. It is more expensive to maintain a trestle than it is to maintain an embankment?

A. Yes, sir; generally speaking.

Q. Now if a levee were there high enough to protect the railroad from overflow by reason of the overflow water from Little River, you could cut out the trestle entirely?

A. Well, you could possibly cut out that one but you would have to increase the opening at the main channel of the river.

71 Q. Isn't the opening at the main channel of the river sufficient to carry off the water?

A. In times of storms I would say no.

Q. Have you ever figured it? A. No, I have not.

Q. Do you know how high since that bridge was put in, how much open space was left there?

A. No, I don't. Well, I do know this from the records of the company that opening that the main river crosses was pretty well occupied, and there was also water going through this other, which was evident by it seeking a way to get out.

Q. But you don't know anything personally? A. No.

Q. Assuming that that bridge that is there now is sufficient to carry off the volume of water that would be diverted by reason of this levee, wouldn't it be a benefit to your railroad to have a levee there of sufficient height and thickness to keep these waters off of it? A. I cant see how it would.

Q. Why?

A. In the first place, I very much doubt if a levee could be built of that nature.

Q. Assuming that it could?

A. No, I don't see how it would be a benefit. It is well sodded; well grassed so the water doesn't bother us.

Q. You stated that it was more expensive to maintain the trestle work than it is solid foundation? A. Yes, it is.

Q. And you have stated that the trestle work could be obviated in the event a levee of sufficient width and height was built to keep back the waters? A. Yes.

Q. Wouldn't that result in a benefit to your road?

A. It would to that extent, if such a thing were done.

Q. Do you know whether that bridge has been washed out?

A. I have never seen it washed out; I understood from the records there was some slight washing out once in 1915.

Q. It washed out in 1915?

A. I really don't know of my own knowledge because I was not connected with the railroad at that time.

72 Q. You don't know that the railroad traffic was delayed there by reason of a washout for more than 24 hours in 1915? A. I know there was some delay.

Q. Wouldn't a delay of a day in traffic on your road cost a great deal of expense to your railroad?

A. It is a pretty broad question. It would depend a good deal on where it was.

Q. Well, right at that point?

A. Yes, it would cause some.

Q. Well it would cause a very heavy expense, wouldn't it to stop the wheels of the railroad for that time?

A. It probably wouldn't stop; it would probably detour.

Q. Well, you would have to pay for that?

A. Yes, sir.

Q. And it would take you a good deal longer to haul the same amount of freight? A. Yes, sir.

Q. Now where would you detour from? A. I don't know.

Q. You would have to go off of your line at Spiro?

A. Wherever the Frisco crosses it on the north. At Poteau.

Q. You would have to detour there and go down the Frisco to Hugo? A. I expect that would be the way.

Q. And then you would have to come around to Ashdown on the short line? A. I expect so.

Q. Wouldn't that be about two hundred miles out of your way? A. No, I don't think it would be that far.

Q. It would be quite a heavy expense?

A. It would cost us the cost of detouring, yes.

Q. Now you don't know anything about the district to the east of the road? A. No, I have never been out in there.

Q. Have you taken a topographical survey yourself of this vicinity to determine the amount and volume of water in times of high water that goes under that trestle south of Neal Springs? A. Have I done that personally?

Q. Yes, A. No, sir.

Witness excused.

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73 C. E. JOHNSTON, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. Your name is C. E. Johnston? A. Yes sir.

Q. Mr. Johnston, prior to the taking over of the railroads by the United States Government, what position did you hold with the Kansas City Southern and Texarkana and Ft. Smith?

A. General Manager.

Q. How long had you been General Manager?

A. I was made General Manager in February 1916,—no 1917, February last year.

Q. Did your duties as General Manager take you over the entire line? A. Yes, quite frequently.

Q. Were you with the company before you became General Manager?

A. Yes, I have been with the company since 1906.

Q. In what capacity did you start in with the company?

A. I came here as locating engineer and served in that capacity for approximately two years. Then I was made office engineer in charge of the company's records, engineering records in the general office for about a year, and then I was made division engineer in charge of reconstruction work and in that involved certain locations. I remained in that capacity until June 1, 1911 when I was made Chief Engineer and in that capacity until February 1917 when I was made General Manager.

Q. Have you given this matter of this improvement district study,—the question as to whether or not the construction of those improvements provided for in that act would be of any benefit to the property of the Kansas City Southern and Texarkana & Fort Smith, have you given that matter study and investigation? A. I have.

Q. Can you give us the exact length that is in the district, length of main line? I think Mr. Phelps testified to that but you probably have the exact figures.

74 A. I made these calculations myself the best I could from the descriptions furnished. I think it was the petition which quoted the act, and that is approximately 2.1 miles main line and .62 miles of what we call the detour line, and approximately .89 miles of side tracks.

Q. Now how much acreage in the entire drainage district?

A. Well, the best we could tell from the same descriptions in making the calculations you understand, we didn't have the notes for the boundary line, that is the longitude and topography notes, but the best we could tell on the revised areas was 12,000 acres, in that neighborhood.

Q. And under the act of 1915, how much was that?

A. Calculated along the same basis taken from the petition, it was approximately 28,000 between 28 and 29,000.

Q. I wish you would describe the kind of road it is that runs across that northwest end of this drainage district. I mean by that the character of the dump and the nature of the road. A. The nature of the railroad?

Q. Yes sir.

A. Well, it is mostly fill constructed during the original construction of the road which was back prior to 1900. As I recall, it was somewhere around 1890, but it is a fill that ranges in heighth, starting at Neal Springs and running to the first trestle which is the relief opening referred to in this case, the

fill averages from ten to fifteen feet, and from this relief opening south for a distance of about a mile and a quarter is a fill or embankment which ranges from eight to fifteen feet high, and then we have the crossing of the river. That crossing is a trestle about 1100 feet and the steel span 250 feet in length, and then you go to the other side a mile and get on high ground towards Winthrop.

Q. Is that steel opening there which is the right part of it above overflow of Little River?

A. It is after the first quarter or half mile. It is a short distance.

75 Q. In other words, from the main channel to the right bank at overflow the steel bridge is of what length, did you say? A. 250 feet.

Q. And the trestle at the bridge is what length?

A. On the north 505 feet, and on the south it is 600 feet.

Q. And is that trestle [—] open one immediately north of the steel bridge? A. Open trestle.

Q. And how high above the ground is that?

A. It averages 20 to 25 feet; more nearly 25 feet.

Q. Now as to the length of the open trestle north of that, the one just south of Neal Springs, what is the length of that trestle? A. That structure is 510 feet long.

Q. What is the heighth of that generally, above the ground?

A. It is approximately 15 feet; it ranges from 13 to 15 feet only a short hole or channel through there.

Q. Was that part of the road reconstructed after you came with the company?

A. No, that is the old part where this trestle is. I located and had charge of the building of the detour line in 1909 and 1910.

Q. State whether or not the track from Neal Springs south was raised to any extent?

A. It was not from Neal Springs south.

Q. State whether or not there has ever been any trouble from overflow or washouts there, and if so, what it was?

A. The bank upon which the line is built across that bottom is above the overflow of August 1915. I was there. And it was during the Gulf Coast storm we had washouts from the Missouri line to Port Arthur and I started in at the north end and it took me nine days to get through cleaning up washouts. And during that rise, which from the best information I can get, which is naturally hearsay, but taken from old citizens, this rise was three and a half feet higher than any rise for for-

ty years. Prior to that time I don't know. Anyway the
76 rise of 1915 didn't get over the track but owing to the storm it was somewhere like three feet higher than any rise, the water came through there to that extent that it scowered out two or three bents of that bridge.

Q. Was that on the north end or the south?

A. South. I was there. But the water didn't get over the track and it was as I say something like three feet higher than probably the oldest citizens could recollect.

Q. Mr. Johnston, as an engineering problem, why was that open space left there?

A. For the very same purpose as it was serving. It took care of the high water. There was an old channel there and when the river gets out of the bank during that storm the water was all over the bottom land on either side of the track and going through this and the main crossing at a terrific rate, and as I say, it was up to both the caps on this trestle.

Q. What rate of speed, if you can estimate, did the water run through that trestle?

A. Estimating it on a basis of miles per hour I would say ten or fifteen miles per hour. That is approximately, or a guess in other words.

Q. Mr. Johnston, state whether or not as an engineering problem that trestle could be closed?

A. Yes, that trestle could be closed.

Q. Would it be advantageous or disadvantageous?

A. Oh from an engineering standpoint it would not be advisable to close it, no sir. Now you can close that opening and divert the water but from the rise of 1915, with no more opening in that bottom than we have now it would not take care of it. The main crossing is where we cross the river proper.

Q. What steps would it be necessary to close that opening there and open sufficient opening at the river—

Mr. Head: I object to that. That question was before Your Honor in the Miller County Levee District where by reason of the building of the Miller County levee the company had to raise its bridge and raise its track for about 7
77 miles and the court held in that case that those damages were secondary and might not be considered.

The Court: It may not be considered. I think that testimony went in, that is, it might not have determined but the testimony went in. It will be allowed to go in.

Mr. Head: Save an exception.

A. If I understand the question, what would be the cost to fill up the present opening and provide the same amount of opening at the river. The question of what is ample is problematical. I know we need as much as we have now. Now to do that, fill up the trestle opening and extend the opening at the main crossing the same length as at the trestle and dig out the bank, would cost under normal conditions about $27,000.00. I can give you the detail of that if you care for it.

Q. I wish you would.

A. The cost of the present trestle, the value of the present trestle abandoned would be $3,730.08. The cost of filling the trestle $4587.00. The estimated cost of the proposed trestle which is extended in kind with what is there at the present time is $9690.00, and to dig out that extension is $8224.00 making a total of $26,239.00, and to that is added the cost of ballast over the trestle filled $27,600.00 in round numbers.

Q. Have you considered in that the amount of damages that the company might cause real property owners by reason of closing the trestle, if there are any such damages?

A. I can't say that that is a measureable item. You damage it to this extent and that is problematical. If you raise the level of the water above the opening that you might close so that it overflows a greater area of land, why you would probably get some damages, but with additional opening at least the same length down at the main crossing, I cannot believe the water would be put to a greater heighth than what it has been, if the old trestle was filled.

78 Q. Mr. Johnson, I wish you would state whether or not in your opinion the construction of the drains and levees proposed by this drainage district would be of any benefit to the property of the Kansas City Southern and Texarkana and Fort Smith?

A. In my opinion it would not be of any benefit. We have a bank there that is approximately 30 years old, between 25 and 30, as I remember the records. It is thoroughly seasoned and thoroughly settled. It is matted over with sod, water on it doesn't hurt it. It doesn't settle; the maintenance on it is no more than it is a mile from there in the hills, and so to speak, we have gone through that period of seasoning of bank where water or flood on a bank damages it. I can't see any benefit whatever of a drainage district or levee district. So far as we are concerned, we are above high water. As I look at the thing, when that line was built the engineer had one of two things to do; they would either lay the grade line down on the ground and take the chances of overflow year to year as the river came out of its banks, or they would spend the mon-

ey, which was scarce at that time and put that bank above high water, and it accomplished the very same thing that was sought to be accomplished. We have had that handled at 25 cents, that was paid for at that time and cost us somewhere around $25,000.00 or $30,000.00. At any rate with what they had before them, they could have laid the grade line, and instead of that they went and spent the money and put the embankment up above this high water plane and have enjoyed that for years and for that reason I say there is absolutely no benefit. We have weathered the storm with this bank and we know what we can do with it. My claims is that there isn't any benefit.

Cross-Examination

By Mr. Head:

Q. You gave the measurement of the dump in bottom between Neal Springs and the river. Did you measure that yourself?

A. I referred to the original records for it.

79 Q. You don't know how high it is of your own knowledge?

A. Oh yes, from my own knowledge. I have taken a rod. —I located that new line there myself.

Q. Did you measure the heighth of that dump at that time?

A. I have measured it many times at many different places. For this purpose I didn't go and make a survey.

Q. You didn't have any trouble in finding out how much of your line was in this district?

A. No, my estimate is approximate.

Q. It coincides with the amount you are assessed?

Q. The description is general and the estimate is general.

A. I don't know. I have never checked it.

Q. If that is true that is a coincident? Is that a coincident or does it seem to your mind that that line is a definite line? I am talking about the length of the track that is in the district.

A. The length of the track in the district, it would not be a difficult thing to say that the track within the district that it crosses here the bank of the creek like it does in this case south of Little River. That is determined. We know where that is.

Q. You found where the line joined the hills?

A. Approximately.

Q. You ascertained that though, didn't you? You went out there to examine it?

A. I took it from our records. I could tell from this profile about what was included in the district from the description.

Q. There was no trouble about that?

A. Not to make an approximation.

Q. You say you lost two or three bents of that trestle near Neal Springs in 1915 caused by overflow? A. Yes, sir.

Q. You were there at that time? A. Yes, sir.

Q. How many trains did you have there hauling rock and gravel to protect that dump?

A. I don't understand that we had any. We had a pile driver up there.

Q. Didn't you have a lot of rock put in there?

80 A. We threw it in later to fill the scowered hole.

Q. Didn't you throw in a lot of rock to try to keep the washing out of the bank?

A. They probably threw in some sand bags.

Q. Didn't you have a train bringing them up there?

A. We had a train on this district that put rock in most every opening that we had. That was a storm that was quite expensive to the railroad. A storm of that kind—

Q. I am not asking you that. I am asking you if carrying this material up there and the men necessary to use it wasn't quite an expense to the railroad?

A. Everything we do is expensive.

Q. Can you state what actual expense was incurred there at that time?

A. I would say, if you want a figure on it, approximately a thousand dollars, that is a guess. It is a small item compared to our expense elsewhere on account of the same storm.

Q. In addition to that your trains were delayed there for about thirty or thirty-six hours, wasn't they?

A. No, we came down there—the first train that could get through there from the north came down there in one evening. There was a delay there but that was on account of not getting to it on account of other places. It was thirty or thirty-six hours but you understand we couldn't get to that place on account of similar trouble north.

Q. Why couldn't you get to it from Texarkana?

A. Why, the reason is we had trouble coming from there.

Q. I will ask you if before the bridge went down if you didn't already have men there?

A. Yes, the roadmaster was there.

Q. You were there then?

A. I came in as I was cleaning up the washouts.

Q. Then you don't know what time the thing went out?

A. Oh yes, I know.

Q. How long after the bents went out before you got there?

A. I suppose four or five hours.

81 Q. Was that all the delay that there was in coming down from the north, four or five hours?

A. Well, I would say that I got in there four or five hours after the track went out. Just to demonstrate the extent of that storm I left that place and went to the Natchez River and stayed there three or four days.

Q. Four or five hours delay wasn't much?

A. I am not saying that.

Q. Then you had about thirty hours delay in repairing it?

A. Before probably we could get our forces there to do it.

Q. Wasn't that extremely expensive to the railroad to have this line out?

A. All of it was expensive. We spent a good many thousand dollars on account of that storm.

Q. I am talking about the stopping of these trains. They would not have stopped that long if that had been in there?

A. Some of them would have been stopped. At that time we had a bridge gang and the delay growing out of that would not have been much.

Q. Even a delay of six hours on a railroad of that character entails a very heavy expense, doesn't it?

A. Well, [if] may and it may not. It may come at a time when it will hold up one or two trains.

Q. Didn't that hold up a half a dozen?

A. It held our usual number.

Q. Don't you know that you had more than a half dozen trains?

A. I know that we had more than a half dozen trains die.

Q. Didn't you have more than a half dozen scheduled to go through there in thirty hours?

A. I would not doubt that; I expect we have.

Q. Mr. Johnston, do you know what the fall is in the ground from the point where this trestle is on your road down to the east end of the district?

A. No, I have never had occasion to measure that.

Q. If you had known the elevation of the ground at the point where the bridge crosses, and the intermediate elevation of the ground from there down to the east end of the district you could tell the velocity with which water went under that bridge, couldn't you?

82 A. Yes, you could calculate or you could measure it by meters and by various other ways. The calculations with reference to discharges of that sort are generally very much bogus. I mean by that you can arrive at many calculations. In connection with the Kaw Valley Drainage

District in Wyandotte County, Kansas, I have been interested in for a number of years. After the 1903 flood which was the extreme flood in that section, they employed a bunch of army engineers supposed to be very capable of determining the discharge of the Kaw and what it would discharge along certain lines in a certain width of channels and a lot of them arrived at a minimum figure. They said that the opening should be at least so much and anything that you can get beyond that will be so much velvet, so to speak. The Kaw Valley Drainage District was organized after this report and completed. The plans to go ahead with this work and they figured that it would require 150,000 instead of 300,000 cubic feet per second to get rid of the water, in other words, just one-half of what the nearest army officer figured based on different formula. The result was that the army formula was carried out. I think in 1915 they had certain floods and in their talking of enlarging the present channel after doing all this protection work they hadn't enough outlet to carry the water off. I merely mention that to show that the calculations were a hundred per cent different.

Q. Well, the fellow that calculated smaller was wrong?

A. Experience has proven that and experience in the case of our openings for main line openings, the line that I have had my experience on are based upon three or four important items. We first find the area drained, then we find the area flooded and then the high water mark and about the last thing we do is ask some old resident how high he has seen the water, and then we try certain openings and if it will carry the volume of water off—

Q. That is in the Kaw Valley, I am asking you about the man that calculated one-half was wrong, wasn't he?

A. I would say so, based on experience.

Q. What method is there of calculating the extent of the flow of water drained by the levee? The fall, the amount of the opening and things of that character?

A. That is the theoretical formula. There are several different formula. You have to use a good efficient in making calculations. There are certain assumptions that you must make. You can make them small or large. That is the reason I say the calculations are bogus.

Q. Do not all engineering companies, which engineers study a larger standard provide a means for the calculation of the volume of water that will go through a certain opening where the volume is given and the extent of the openings and?

A. They all provide a formula. As I say, they use the given efficient and that is arbitrarily based on local conditions.

Q. Now it is more expensive in engineering to maintain a trestle work than it is to maintain dump work?

A. No, I wouldn't say that it is. Some times it is and some times it isn't. I can mention embankments that have cost us more money than trestles ever would.

Q. I am asking you about generally. Isn't it the general thing that the railroads maintain their dirt dumps cheaper than they do the trestle work?

A. I would say the difference is in favor of the embankment.

Q. The element of safety is a good deal in favor of embankments? A. I would say yes, that is my judgment.

Q. As a matter of fact, the railroads only have trestles where it is necessary to have them in good engineering?

A. Well, that is rather a broad statement. Personally I would say that that is true. It is good engineering lots of times to have trestles where it is not good practice to put in embankments.

Q. What do you put in trestles for?

84 A. Several reasons. One reason to handle drainage, another reason you may not have the material to build the embankment and have to haul it for several miles. On the Midland Valley,—I am General Manager of that line too—we have a trestle approximately one hundred feet high which is cheaper to maintain than an embankment.

Q. You could get dirt in a half a mile to fill it in in this case? A. I should say in less distance than that.

Q. So the conditions with reference to that bridge over on the Midland Valley is quite different?

A. This bridge is for the purpose of carrying water.

Q. If it were not for carrying the water there would be no trestle there? A. That follows.

Q. Then it is more expensive to maintain than the rest of the track there at that point, was it, figuring your replacements and things of that kind?

A. Answering the question as I understand it that is true.

Q. Now assuming that a levee were built there of sufficient width, [heighth] and thickness to prevent any overflow of the water of it going against this railroad, that would be then a distinct benefit to the road on that account?

A. That in itself would be, but it would not be good engineering to do it. My reasons for that are these; that opening is required at that particular place under the present con-

ditions. If you change conditions and close that opening, you must provide the same or more opening elsewhere to handle that water. The overflow of 1915 clearly demonstrated that we have not sufficient opening to handle that water. The reason that bridge scowered out and we lost two bents of the trestle was due to the extreme [heighth] of it that caused that scowering, and that is an indication that we have not sufficient opening, and if we close that we must get it elsewhere.

Q. Do you know whether the velocity of the water in
85 the river channel itself is more rapid, or less rapid than that through this trestle work that we have been speaking of?

A. I don't know positively. I merely could express an opinion. I don't think there is much difference.

Q. Do you know whether in a certain area, a small circle the condition of the stream at the point where the bridge crosses that in that same circle the water would flow more rapidly than it would in a straight course?

A. The more circuitous the slower the velocity, because it always retards the flow of the water to go against the bank. The straighter the course the faster the flow, on the same principle of scowering out the jets.

Q. Now you say this would raise the water level at the Little River bridge in the event this trestle were closed how much? A. I don't say.

Q. You don't know? A. I don't think anybody knows.

Q. Have you ever figured it. A. I couldn't figure it.

Q. Why couldn't you?

A. Because there are so many elements that enter into it. I could make you some figures but I would hate to rely on it. A great deal depends on the characteristics, the obstructions in the stream. All those things enter into a retardation of the flow.

Q. Assuming that you did raise the bridge if necessary, across Little River and provided such openings as you deemed sufficient there, I will ask you to state if it would not be a distinctive benefit to your road to have an embankment or levee of sufficient width and [heighth] to close up this trestle work near Neal Springs there in the district?

A. I would say not. I can see no difference between the embankments or opening here or over there as far as open-

ings are concerned. So long as you have to maintain an opening it is the opening itself that is involved.

86 Q. Is it your contention that the bridge across Little River would have to be raised any to take care of this water?

A. I don't know. In my opinion it would be a very large question. I would not want to take many chances on it since I have seen the 1915 flood. At the present time or for that flood we got by with it in that opening, but that is no reason to believe that we will never have a higher rise than that one. I would like to see a greater factor of safety provided.

Q. How much higher above the high water mark is the bridge, that is, the bridge proper, the 250 feet of steel work at Little River than the top of the trestle work over this depression near Neal Springs?

A. I can give you that from this profile very closely. Approximately the difference between the bottom of the girder and the steel bridge and the top of the rail at this trestle that we spoke of is approximately 300 feet. In other words, reducing it another way the flood of 1915 cleared the bottom of the span something like four feet.

Q. That is the bottom of the span on the bridge across the river?

A. The span on the bridge across the river. You understand that the span sets up higher than the approaches. The approaches start down on a grade. The bridge was put high on account of the super-structure standing above the rails.

Redirect Examination

By Mr. McDonough:

Q. Mr. Johnston, the map introduced shows a point of the river right west of Neal Springs, or west of where the detour and the old line join. Do you know whether that is a farm over there or not?

A. As I recall it the last time I was in there—it has been two or three years ago—there were some patches of ground, I think in corn and cotton.

Q. Now then the river as shown on this map runs to the southwest and then northwest, and then turns around and comes south, and then comes southeast. Now then the

87 open trestle way through which the water now goes is there to let the water run through, and that is 510 feet long. If that is closed up will it not cause the water to accumulate over there in section 3 on that side to some extent and will it not raise the water in Little River in other words, to some extent?

A. It should for the reason that this particular opening is close to the river at the point opposite.

Q. Now then suppose there was a levee built between the line there and the rivers, and say that it was built three feet above the railroad tracks, would good engineering require you or permit you to close that opening?

A. No, I should say positively I would not close that opening if the levee was six feet above high water mark.

Q. Why?

A. For the simple reason that it is the natural channel and if the levee ever breaks, it is good protection if the levee breaks.

Q. Do you know anything about the road that is used there?

A. Yes, sir, I have seen it and been on it.

Q. Is that built of such material as would be a good levee?

A. Why the local rains have washed that road so badly it is almost unsafe to ride a horse over it.

Q. State what would be the effect then of the river water coming against that?

A. Unless it is protected, if the current hits it strong, which it is not at this time it will wash away like sugar if I am not badly mistaken.

Q. Now taking the fact as testified by you that the top of the rails at the bridge across Little River, that the bridge down here is about three feet higher than the top of the rails at that opening south of Neal Springs, what would have to be done with the levee if that levee is built around there down to the north end of the trestle at the bridge? Will it not have to be connected with the dump at the Kansas City Southern?

88 A. Yes, that is provided the three feet difference is the difference between the top of the rail approximately at this trestle and the bottom grade. The rail on the steel span is something higher than the top of the rail on the trestle.

Q. Then it would join, would it not?

A. It would join necessarily, but that isn't a real serious feature so far as you propose to close that levee. Now we have in a few instances similar conditions where levees join and the track is not raised that is protected by sand bags thrown in there while the flood is on and released it.

Q. Would you not have at that point the same danger of washing spans of your railroad away? A. Absolutely.

Q. Then you would not get rid of the dangers they are talking about?

A. Not in the least, as long as you have not enough water way.

Recross Examination

By Mr. Head:

Q. Do you know how much lower the high water mark is at Little River bridge than it is at the trestle?

A. I can't give you that figure; it can't be very much.

Q. In locating bridges I believe you stated that one of the means by which you ascertained the high water mark was to get information by looking on the trees and the evidences of that kind, and also by inquiry of the inhabitants?

A. That is true generally at those times when we have a storm or flood we have our people maintain those marks. I mean by driving nails in trees and those kind of things so we can keep that record.

Q. Do you know that there had been four inches higher water in Little River prior to 1915 than there was that year?

A. I have heard so; about forty years ago or such a matter; not since the construction of the railroad.

Witness excused.

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89 FRANK C. PECK, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. What is your name? A. Frank C. Peck.

Q. Where is your home? A. Kansas City, Mo.

Q. What business are you engaged in? A. Contracting.

Q. Have you a business at Horatio? A. Yes, sir.

Q. How long have you had it there, Mr. Peck?

A. The last time I have been there a little over four years; prior to that about ten years ago I was there three years.

Q. Have you been familiar with that road of the Kansas City Southern there for ten or twelve years passed?

A. Yes, sir.

Q. You have business with the Kansas City Southern in the way of furnishing gravel? A. Yes, sir.

Q. Are you familiar with the surrounding country there where that improvement district is? A. Yes, sir.

Q. Are you familiar with the value of lands there generally, Mr. Peck, or have you [deal] in them?

A. No, I have not dealt in lands.

Q. Are you familiar with the construction of the railroad along there from Neal Springs where the detour connects down south of Little River where it crosses Little River, are you?

A. Yes, sir.

Q. Have you had any experience in railroad work?

A. Yes, sir.

Q. How many years have you had?

A. I started in more or less when I was about twenty years old.

Q. Connected with the construction or operation of them?

A. Both.

Q. Did you have anything to do with the matter of drainage of railroads or study that, or watch it?

A. Yes, to a certain extent.

Q. Now I wish you would state whether or not in your opinion taking that railroad as it is located, and the lands sought to be drained by this drainage district, whether or not
90 the drains and ditches and levees proposed would be in any way benefit the property of the Kansas City Southern and the Texarkana and Fort Smith Railway Companies? A. No, sir; it would not.

Cross-Examination

By Mr. Head:

Q. Do you know what levee is proposed?

A. Why, except what I have seen on the blue print and what I have been told.

Q. Do you know how high that levee is? A. No, sir.

Q. Do you know the volume of water that goes through there? A. I have seen a lot of it go through there.

Q. Were you there in the fall of 1915? A. Yes, sir.

Q. Are you an engineer? A. No, sir.

Q. Did you ever study engineering? A. No, sir.

Q. Do you know what drains are proposed to be put in there? A. No, sir.

Q. Do you know whether it is more expensive to maintain a trestle than it is to maintain an earthen roadbed?

A. It is more expensive to maintain a trestle.

Q. How much more? A. I couldn't say that.

Q. Couldn't you give us an idea with all your experience?

A. A dump or fill is a permanent proposition and I don't know how long creosoted timber lasts. I don't know whether it has ever been tested out.

Q. Well, you know that the element of safety is very much in favor of the dump?

A. In some cases; not with water.

Q. Well, if the water were absolutely barred away from that point an earthen dump would be a great deal more safe than a trestle? A. Well it would be no more safe.

Q. Didn't you tell the court a while ago that a railroad on an earthen bank is more safe than a trestle? A. No, sir.

Q. Isn't that a fact?

A. No it is not; I don't think it is safer.

Q. I so understood you to make that statement a while ago?

91 A. No, I said an embankment is a permanent improvement.

Q. Well, didn't you make the other statement, too, that the element of safety was greater in an embankment than in a trestle? A. No.

Witness excused.

C. E. JOHNSTON, recalled by defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Mr. Johnston, you stated a minute ago that in the event a levee was there that you would still want to maintain that trestle in order to take care of the water if the levee broke. Now in the light of the experience you had with the trestle in 1915, if that levee broke. I will ask you if the trestle would not go out just like the road would—would not that trestle be undermined just as it was before?

A. It probably would if we had as much water as we had in 1915. If we didn't have the trestle and we had as much water as we had in 1915 I don't know what would happen.

Q. Isn't it a fact that the mere fact that you have a levee there four feet higher than this and of corresponding width, and if that caused a much more destructive force than the water had in 1915?

A. I don't think it would. I don't say it would not. It may and it may not. If it came through a narrow channel with a very high head against it, very likely it would take out everything in front of it. In other words, the maintenance of the trestle there after the levee is built is good protection.

Q. Isn't it a fact that when the levee breaks you always have a big head of water? A. Generally speaking.

Q. And that would carry everything before it?

A. There have been many cases where it did and many cases it did not.

Q. I will ask you if with a big head of water the levee
92 don't break through entirely?
A. I don't agree that that is the case.
Q. Have you had any experience with levees?
A. I have had considerable experience. We have some on our hands now and we have not filled any trestles on account of them.

Witness excused.

J. J. TAYLOR, a witness sworn for the plaintiff, testified as follows:

Direct Examination

By Mr. McDonough:
Q. Your name is J. J. Taylor? A. Yes, sir.
Q. Where do you live? A. Texarkana.
Q. What is your business?
A. I am superintendent of bridges and buildings and water service for the Kansas City Southern Railroad.
Q. Any other road besides the Kansas City Southern?
A. The T. & F. S. a subsidiary line to the Kansas City Southern.
Q. How long were you connected with the Kansas City Southern before the Government took the road over?
A. Fifteen years.
Q. During all of that time what has been your line of work?
A. Same as now, in charge of bridges and buildings.
Q. Are you familiar with this line of road just north of the Little River including Neal Springs? A. Yes, sir.
Q. That is in your jurisdiction? A. Yes, sir.
Q. How long have you been familiar with that road?
A. Seventeen years.
Q. What kind of road bed have you there, Mr. Taylor, beginning where the detour connects with the old line coming south across Little River, what kind of road bed?
A. We have a good, well settled and established road bed in there about ten or twelve feet fill, probably twelve feet I would say.
Q. State whether or not that road bed as it is now and as it has been for a number of years, has given any trouble of any kind? A. No, sir.
93 Q. Were you there in the overflow of 1915?
A. Yes, sir.

Q. What happened to a part of that track at that time, did any of it go out or partly out, or anything of that kind?

A. Yes sir; we had four bents of the piling to scower out from bridge 443, which is in that stretch of track.

Q. Was that, or was it not the highest water you have ever known since you have been connected with the road?

A. The highest I have known; the highest I have ever seen.

Q. Are you familiar with the surrounding country there to some extent about where the drainage district is down to the southeast?

A. Very little; I don't know much about the country down in there.

Q. I wish you would state in your opinion and judgment, if the building of levees and drains and ditches in a drainage district extending three or four miles, or five or six miles to the southeast and including Neal Springs, and including a levee between the railroad road-bed and Little River south of Neal Springs, whether or not any such levees and drains of that kind would be of any benefit whatever to the property of the Kansas City Southern and the Texarkana & Fort Smith Railroads? A. No, sir; none at all.

Q. Have you noticed the kind of dirt or material that was being used in the construction of that public highway that comes along there just west of the old station of Neal Springs?

A. I never gave it any particular notice, no, sir.

Q. State, Mr. Taylor, whether or not in your opinion the construction of a levee on the west side there would obviate the necessity of keeping the opening that is there now?

A. No, sir; I don't think so.

Q. You think the opening would still be necessary?

A. Yes, sir.

Q. And in the event that the levee broke at that point, what would be the effect of it upon the track of the Kansas City Southern Railroad Company?

94 A. I would expect it to be dangerous, if it was levied and did break. I don't know what it would mean, but the chances are it would be bad.

Q. Mr. Taylor, state whether or not if a levee or embankment of a railroad during the first four or five years, or six or seven years, or eight or ten years of its existence, is not much more easily affected and washed out by a flood than after it has seasoned twenty years?

A. Certainly so, yes, sir.

Q. In the event that that opening in the trestle there now just south of Neal Springs should be closed, would it be necessary to take care of the water that was closed out there?

A. Well, we would have to provide additional opening at the river or some other point for the water; we would have to have a like amount or more at some other place to take care of the water,—to let it across. We really haven't got enough opening now.

Cross-Examination

By Mr. Head:

Q. Mr. Taylor, how long did you say you had been on the work for the Kansas City Southern and Texarkana & Fort Smith?

A. Seventeen years, I believe it is, or a little more.

Q. Then you were on there when the Miller County Levee District was built and the Ogden Levee District?

A. I don't know.

Q. You know where the two levees are, one on this side of Red River and one on the other [wide]?

A. Yes, I know where they are.

Q. Isn't it a fact that you closed up over a mile of trestle work after those levees were built and never made any openings at all?

A. In the Red River bottom?

Q. Yes, sir. A. No, sir.

Q. The trestles are still there? A. Yes, sir.

Q. Isn't it a fact that you didn't make any increased provisions for the water?

A. No, sir; you are mistaken.

Q. I mean the water is closed off from it by the levee?

A. Yes, so long as the levees hold it is closed up.

95 Q. You didn't have to make any additional openings at the river to maintain the water outlet?

A. No, sir; we have got the openings there.

Q. I understand the water has been going through the old bridge at Red River?

A. It has since the high water.

Q. When was that levee built on the north side?

A. I couldn't say.

Q. It was built in 1912. Don't you know that?

A. I don't know that. I will tell you what I do know; they haven't had by—I will say four feet approximately—of high water, what we call extremely high water, that is at Red River since that levee was built.

Q. You had the 1915 overflow?

A. We didn't have any such high water in 1915 as we have had there since I have been on this road.

Q. You have never found it necessary, however, by reason of any water that has come through there in 1912 to put in any trestle work to take care of it?

A. No, sir; we have not.

Q. Can you explain why it is going to be necessary to do that up at Little River?

A. We find from experience that we have not got enough opening now to take care of the water. The lack of opening is what caused the pilings to scower out.

Q. How near to the top of the bridge has the high water at Red River ever come, to your knowledge?

A. Well, I couldn't say positively. Do you mean the Red River bridge proper or the trestles out in the bottom?

[A]. Red River proper.

A. I would just have to estimate it—I would say 12 feet—I would say approximately 12 feet is as high as the water has ever come from the base of the rail down to the water.

Q. That is the element of safety that there is in there then to take care of the water that theretofore went under a mile of trestle work on this side?

96 A. Only the extreme high water in Red River bottom the water gets near our track,—gets more dangerously high out in the bottom than it does at the bridge proper.

Q. Well, you have made no provisions to take care of that water with that margin of safety there?

A. No, sir.

Q. Are you an engineer yourself

A. No, sir, I am not a theoretical engineer.

Q. Have you ever gone over this ground and taken the levels of it to see how it lay and the fall of it?

A. No, sir.

Q. Have you ever gone over this proposed levee drainage district at all? Out in.

A. Out in the interior?

Q. Yes, sir. A. No, sir.

Q. All you know then is by being along the track?

A. That is where I get my information.

Q. Assuming Mr. Taylor, that the bridge at Little River can carry the volume of water that would be diverted in the event this trestle was stopped up, assuming that to be a fact, and assuming further that a levee was built there of sufficient heighth and thickness to absolutely prevent any water from coming against this trestle, wouldn't that be of benefit to the railroad?

A. I don't think so.

Q. Why wouldn't it?

A. Because the volume of water that we have experienced with in 1915, the trestle we have at the river would not take care of it.

Q. Assuming as a matter of fact that it would take care of it, assuming that you have got enough opening to take care of it and assuming that this levee was built so it would absolutely keep back any water from the railroad, wouldn't it be of benefit to the railroad to have a levee under those conditions?

A. I can't see why it would.

Q. Why wouldn't it?

A. I don't see wherein it could benefit it.

Q. It is more expensive to maintain a bridge than it
97 is to maintain a dump?

A. It may be that. We would [not] doubt maintain the bridge if the levee was there.

Q. The question is, isn't it more expensive to maintain a trestle than it is to maintain a dump?

A. Yes, sir.

Q. Isn't the element of safety a good deal in favor of safety with a dump than it is with a trestle?

A. Yes, sir.

Q. Your railroad experience teaches you those facts?

A. Yes, sir.

Q. Now then, if this trestle could be eliminated there would be a benefit to the railroad to that extent?

A. Along that line to some extent.

Q. The only question then is whether or not the bridge down at Little River and the openings you have got, is sufficient to take care of the water that would be diverted if this levee was built?

A. You mean that—

Q. I mean that the only question would be as to whether or not the railroad was [benefitted], in your [mine], whether the openings down at the river are sufficient to take care of the water in the event that a good levee that would hold water off the railroad were built?

A. Yes, sir.

Redirect Examination

By Mr. McDonough:

Q. If you had to build an additional space at the bridge, —at the steel bridge—and widen it, it would cost something to do that, wouldn't it?

A. Yes, sir.

Q. And the water as you have it now, in your opinion you haven't enough space now?

A. No, sir.

Q. And that includes the 510 feet you have down there and that at the bridge?

A. Yes, sir.

Q. Hence in filling in that now if you cut out the trestle, you would have to increase the opening at Little River?

A. Yes, sir; beyond any doubt we would have to increase the opening at the river to take care of the water.

Q. Mr. Taylor, with reference to the Little River
98 bridge, isn't it true that that bridge is so much higher—I mean the Red River—so much higher than the levee that the water would run over the levee before it got to the bridge?

A. Yes, sir.

Q. Hence that would not enter into it like it would at Little River?

A. No, sir.

Q. Now if a levee was built at this trestle at Little River how high would it have to be built so that the water would not run over it, before the water reached the bridge? I don't know whether that is clear or not. The point that I am asking you is this: If you built that levee say three feet higher than the top of the rails, would a levee that high be high enough to keep water from running over, in other words if the water got up to the bridge and less than that down there, wouldn't the water fall in torrents over a levee that was only three feet higher than the rails at the trestle?

A. I think it would.

Recross Examination

By Mr. Head:

Q. You don't know how much higher the water would go at the Little River bridge in the event this water were diverted from this trestle, do you?

A. No, sir.

Q. You don't know the volume of water going through that trestle do you in time of floods like 1915?

A. Of course, I don't know, no, sir; but I have a pretty good idea how much space it would take to carry it judging from what we had and what was going on.

Q. Are you an engineer?

A. No, sir.

Q. Have you had any engineering experience at all?

A. Well, not in actual theoretical engineering, no, sir. But I am a practical engineer all right.

Q. Now you have said that the bridge at Red River was higher than the levee in the Miller County Levee district and the Ogden Levee district. Isn't it a fact that the bridge at Little River would still be higher than the project proposed to be built by the district?

99 A. I don't know anything about the heighth of the levee proposed to be built.

Q. Isn't it a fact that your Little River bridge could carry a volume of water two or three feet more than it did carry in 1915?

A. No, sir; not and leave our track safe.

Q. What portion of the track would be unsafe?

A. Well, I don't know just how the grade line lays on the south side of the bridge. It would put it over the track and would have to get relief over the track at the lowest place which might possibly be south of the bridge. I don't know where that would be.

Q. How much did that overflow of 1915 lack of getting over the railroad dump inside of that district?

A. I don't know exactly. I know about what it lacked getting over the track at bridge 843, but down away from the bridge I don't know.

Q. Can you estimate about how much of the right of way was out of water along from the bridge to the trestle?

A. Yes, I can give you about as I remember, but I didn't measure it and I never heard anybody say. I would say it was up within a foot of the bottom of the ties. That is as I remember it. I am not sure of what it was.

Q. I will ask you if it isn't a fact that the base of the rail on Red River is only thirteen feet above high water mark, while the base of the rail on the Little River bridge is fourteen feet?

A. I don't know.

Q. If that is true you have more element of safety in the Red River Bridge than you have in Little River?

A. No, sir, the track over the bridge is higher than it is there away from the bridge.

Q. Higher than the trestle work approaching it?

A. Yes, sir; than the dump approaching it.

100 Q. Well, the bridge itself is what I am asking you about. Isn't the element of safety thirteen feet on the Red River bridge above high water, while at Little River the element of safety is fourteen feet above high water mark?

A. I don't know just what the high water mark is relative to the base of the rail.

Redirect Examination

By Mr. McDonough:

Q. Do you know which is the swifter stream, Little River or Red River?

A. I believe Red River is. You mean in high water I suppose?

Q. Yes. A. I think Red River is.

Q. You never made any test of it, did you?

A. No, sir.

Witness excused.

J. J. HANCOCK, a witness sworn for the plaintiffs, testified as follows:

Direct Examination

By Mr. McDonough:

Q. Where do you live Mr. Hancock? A. Texarkana.

Q. What is your business?

A. Roadmaster for the Kansas City Southern.

Q. How long have you been Roadmaster on the Kansas City Southern?

A. Ten years and a half.

Q. How far north does your jurisdiction [extent]?

A. DeQueen.

Q. You know where Horatio is? A. Yes, sir.

Q. And you know where Neal Springs is?

A. Yes, sir.

Q. How long have you been familiar with the road at Neal Springs?

A. Eight years and two months.

Q. State whether or not your duties require you to examine and pass upon the road bed?

A. It does.

Q. Are you familiar with the roadbed from Neal Springs south?

A. Yes, sir.

Q. State what condition that roadbed is in,—whether
101 or not it is a good road bed? A. It is.

Q. How long has it been there, ever since you have been with the company?

A. Yes, sir.

Q. Do you know where the steel bridge is that crosses Little River?

A. Yes, sir.

Q. Were you there in 1915 in the flood time?

A. Yes, sir.

Q. What trouble, if any, did you have at the trestle with the water washing out anything?

A. It washed out three bents.

Q. Had you ever had that to occur before? A. No, sir.

Q. Did you ever since then have enough water in there that it washed out the bents?

A. No.

Q. You are familiar with the country a short distance around there, are you?

A. Well, just a short distance, yes, sir.

Q. State whether or not the road bed from Neal Springs south needs any drainage other than what it has?

A. Not that I can see.

Q. And that has been your business for how long, looking after road beds in that way?

A. Well, at least twenty or twenty-five years.

Q. State whether or not Mr. Hancock, in your opinion the construction of a levee in there between the railroad and the river, and the construction of drains three or four miles to the southeast would be of any benefit whatever to the railroad company?

A. I can't see that it would, no, sir.

Cross Examination

By Mr. Head:

Q. Mr. Hancock, you say you are roadmaster?

A. Yes, sir.

Q. Don't you know that part of the dump there at the end of that trestle was washed out in 1915?

A. Very, very little; just a little bit.

Q. Just enough to make you put in an extra bent there?

A. No, sir.

Q. You didn't put in an extra bent there?

A. No, sir.

Q. Did you do the work?

A. Mr. Taylor did the work; I was there.

Q. You didn't see that? A. I don't think so.

102 Q. Wasn't it four bents instead of three that went out?

A. Three, if I remember correctly.

Q. The water was up there to what extent between the road bed and the river?

A. Well, at one point between the trestle and the river the water was about within eighteen inches of the top of the rail.

Q. Well, that would put it how much below the bottom of the ties?

A. Say, about six inches or something like that.

Q. Does water tend to soften the road bed when it is that high?

A. No, sir; it didn't stay there long enough.

Q. Didn't have any effect on it at all? A. No, sir.

Q. Is it more expensive to maintain a trestle or dump in the road bed of a road?

A. Well, in some cases it may be.

Q. Well, in this particular case on that particular trestle?

A. I don't think so.

Q. Why?

A. Well, if we took that trestle out of there and that should be filled in we would have our railroad at some time washed away.

Q. Suppose you had a levee that was sufficient, Mr. Hancock, to keep the water out of there?

A. Well, it would take a big levee.

Q. Suppose you had such a levee as that?

A. Well, the water would go around and come back in.

Q. Assuming that it didn't come back, suppose there was a levee there all the way down sufficient to keep it out, that would be a benefit to the railroad?

A. Possibly, yes.

Q. It would be of great benefit if they could cut out a trestle 560 feet long and put an earthen dump instead?

A. As I say, if the water didn't back up in there any more.

Q. How much more expensive would it be to maintain an earthen dump than a trestle?

A. Of course, after the trestle was filed in and you got a good solid bearing it would be quite a good deal less.

Q. Well, the maintenance wouldn't be as much after
103 it was up?

A. After it was fully settled it wouldn't take it.

Q. You are not an engineer? A. No, sir.

Q. You don't know how much water ran through there?

A. Well, it run over the top of the girders. I would judge that is about fourteen feet.

Q. I am talking about the amount, the whole volume?

A. No, sir.

Q. You don't know how much that volume if diverted would raise the water at the bridge, do you?

A. No, I don't.

Q. It wouldn't raise it much though, would it?

A. Yes, it would.
Q. How much?
A. I couldn't tell you that. It would raise it quite a bit. Lots of water went through that opening.
Q. Do you know what drains are proposed to be built by the district?
A. No, sir.
Q. Do you know what levees are proposed to be built by the district?
A. No, sir.
Q. Do you know what levees are proposed to be built?
A. No, sir.
Q. Or the heighth of them, the width and thickness I mean?
A. No, sir.

Witness excused.

Plaintiffs rest.

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104 ARTHUR HERMAN, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:
Q. You may state your name, age, residence and occupation.
A. Arthur Herman; twenty-nine; Texarkana, Arkansas, and engineer.
Q. You may state whether or not you are a graduate of any institution?
A. I am a graduate from the High School at ————, Alabama; city High School.
Q. In engineering or what? A. Literary.
Q. What experience have you had in engineering, if any?
A. Well, I have had about eight years experience in railroad work, and location and construction about a year in that.
Q. What roads have you worked for?
A. Well, I worked for the Gillham Coal & Dock Company, at Gillham, Alabama.
Q. What kind of work have you been doing for the last eight years? A. Levee and drainage.
Q. State what instruments, if any, you used in that kind of work? A. What do you mean?
Q. Engineering instruments?
A. Transit and level; that is about all.

Q. You may state whether you have been continuously employed in engineering work for this time?
A. No, not altogether.
Q. How much of the time? A. Six years.
Q. Mr. Herman, you may state whether or not you made a survey of the Little River Drainage District? A. I did.
Q. Just state how that survey was made, what you did in making that survey? A. Well, we took—

Mr. McDonough: If the court please, simply to preserve the question, I desire to object to the introduction of the survey on the ground that the act itself uses a description which as a matter of law, it is impossible to locate, simply to preserve the question in the record.

105 The Court: Very well.

Q. Go ahead and state how [—] made that survey?
A. Well, you want me to state where we began?
Q. State the details of the survey, just what you did.
A. Well, we took levels and high water marks.
Q. How did you determine the high water mark?
A. Well, we took the high water by the marks on the trees where we could find them, and by some of the people that lived there, we took their word for the high water marks.
Q. Well, did you go out among the inhabitants of the country?
A. Well, yes, sir; that were right along the river, that lived there during the overflow.
Q. What other means did you have of ascertaining where the overflow was?
A. Well, by the level fall of the river.
Q. Did you have any evidence on the grounds?
A. Well, by the tree marks, places on the trees.
Q. Now in making these surveys, did you keep notes of the work that you did? A. I did.
Q. State whether or not you did that work carefully?
A. I did.
Q. Did you do the transit work yourself? A. I did.
Q. When you got through with your survey what did you do with your notes?
A. They are in files at Mr. Christian's office.
Q. Were you working under Mr. Christian? A. I was.
Q. Do you know whether or not he drew plats and blue prints from the notes you made and turned in there?
A. Yes.
Q. Now how did you find that hill line Mr. Herman?

A. By the high water marks along the hill—took them and run levels out, a continuous lines of levels around the hills and took the marks too.

Q. Could you tell by the line of levels you had and the marks you found where the overflow stopped? A. I could.

Q. Did you locate that line throughout the length of the district in that way? A. I did.

106 Q. And I believe that you stated you turned your survey over to Mr. Christian? A. I did.

Cross Examination

By Mr. McDonough:

Q. Were you in the employ of the directors of the drainage district, Mr. Beeson and Mr. Henry and Mr. Etheridge?

A. Well, through Mr. Christian I was was, and the board. I was put in charge of the survey.

Q You were doing the work for the board then?

A. For the board.

Q. Did you see the map that was made? A. Yes.

Q. Was that map made by you?

A. No, it wasn't made by me.

Q. Where are those notes now? You didn't make the map yourself? A. No, I didn't make the map.

Witness excused.

W. W. Milwee, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Your name is W. W. Milwee? A. Yes, sir.

Q. Mr. Milwee, are you familiar with the cultivated lands in the drainage district proposed here? A. Yes, sir.

Q. About how much land is in cultivation in that district?

A. Well, as near as I can figure it out—of course, I didn't measure it—about twelve hundred acres.

Q. In cultivation now you mean? A. Yes, sir.

Cross Examination

By Mr. McDonough:

Q. How many not in cultivation Mr. Milwee?

A. Well, there is about eleven thousand acres in the district, where the proposed district is now.

Q. What are the value of those lands that are in cultivation?

Mr. Head: I object to that as not cross examination. That is his case in chief.

107 Mr. McDonough: I will make him my witness then.

The Court: It is not cross examination Mr. McDonough.

Mr. McDonough: I will simply make the offer to ask him the value that they put to it. I don't care to press it. It is not material to us in my judgment.

E. W. Beeson, being sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Where do you live? A. Horatio, Arkansas.

Q. What is your occupation?

A. My particular occupation is stove business.

Q. You are one of the directors of the levee district?

A. Yes, sir.

Q. Have you any land in the district in cultivation?

A. Yes, sir.

Q. About how much?

A. About 130 or 140 acres, I guess, something like that.

Q. Are you acquainted with the lands, kinds of lands and charter of lands in the proposed district? A. Fairly well.

Q. What is the character of those lands Mr. Beeson?

A. Well, some of it is a kind of white clay land, a kind of hard pan but very little of that.

Q. Very little of what you call hard pan?

A. Yes, most of it is loam sand.

Q. How long have you had a farm in that district.

A. Well, I have had one about five or six years; another about four years.

Q. Mr. Beeson, in a year when you don't have overflows, an average year, what average crops of corn and cotton do you grow on this land?

A. Well, lands cultivated every year been put in cotton with the exception of the 1915 overflow, it raised a little
108 better than three fourths of a bale of cotton, and maybe sixty to sixty-five bushels of corn to the acre, owing to how they cultivate it.

Q. You may state whether most of the other lands in the district is of the same character as the land you own?

A. A great deal of it, yes. I would say 75% of it, in fact, take my land all over it is practically all the same. What I

have in cultivation is of that loam land. I have a little of the white land myself.

Q. Taking it all around, if that land were properly drained and protected by leevee, it would all be good? A. Yes, sir.

Q. About what average crop of corn and cotton could be raised on it?

A. Well, a man ought to average every year a half bale of cotton to the acre and thirty-five bushels of corn, taking it one year with another. Some years would be more and some less.

Q. What are the particular crops grown at Horatio in these bottom lands? A. Hay, Bermuda grass mostly.

Q. Mr. Beeson, were you in Horatio in August, 1915, at the time they had that big overflow? A. I certainly was.

Q. Can you state how far up on the trestle the waters reached at that time, at their highest?

A. I can on the little trestle between the river and Neal Springs. I didn't go down to the river and don't know how far it was. I was standing on the end of the trestle when the last train went over it.

Q. This trestle inside of the district? A. Yes, sir.

Q. This trestle that went out, you mean? A. Yes.

Q. The other trestle you speak of is the trestle down at the bridge? A. Yes, I don't know anything about that.

Q. State how far on the trestle that went out?

A. Up to the caps; it was hitting the caps, sloshing up against the caps. In fact, I was sitting looking at the trestle this way and the train came over. I went on down to my farm and got my gasoline launch and came back and the bents was out, but the water was beating up against the
109 caps.

Q. What do you mean by caps?

A. The caps sets on the piling and holds the bridge up.

Q. The caps are the sills that go across?

A. The caps are the things that sets on the piling, and then of course, on top of that cap there is a sill, and then on top of that sill is a tie. The water was reaching up to these caps. It was hardly up to the stringers.

Q. How high on the side of the road bed did the water get?

A. On the side next to the river it was up to six or eight inches of the ties. That is, for aways.

Q. That is going on towards the river it naturally got up a little bit.

A. It wasn't up as close to the ties as it was two hundred yards below that trestle the water was nearer the ties than any other place I noticed.

Q. Mr. Beeson, you may state whether any efforts were made by the railroad company to keep that trestle from going out, and if so, what it was?

A. They had piles of sand there; they had sacks of dirt or sand or something piled up around the end of the dump, I suppose to protect the dump.

Q. Which end of the trestle? A. It was at the north end.

Q. When you came back after going to your farm, how long before you came up in the gasoline launch?

A. An hour or maybe two.

Q. When did you get back?

A. I didn't go right back by the bridge; they told me the bridge was out.

Q. Did you see it afterwards?

A. No, sir; I never went back any more.

Q. Do you know whether any part of the dump itself was washed out at that time?

A. I don't, not from my own personal observation because I didn't see it.

Q. Did you see the flood, any of the flood from there after the overflow?

A. No, it was a month before I was up there.

110 Q. To what town is this district tributary?

A. Horatio.

Q. What is the trading point, natural trading point, the most easily accessible trading point to this district?

A. Horatio.

Q. What railroad serves Horatio? A. The K. C. S.

Q. Is there any other road near there?

A. No, sir; not nearer than 27 miles of there.

Q. Well, how about the DeQueen & Eastern?

A. I forgot that; it is not much road.

Q. What kind of road is that?

A. A little short road runs out there 25 or 30 miles.

Q. Does that reach any markets for produce raised by people in the vicinity of Horatio?

A. No, sir; not in the vicinity of Horatio.

Q. Well, I say does that road ran to any market where you could market products?

A. No, sir; you would have to take it to DeQueen to get on it and it don't go to any market that you could market anything at unless it would be a dozen eggs.

Q. What is the condition of this lot of land in the district that is not now in cultivation with reference to it availability for cultivation without levees and drainage?

A. Well, wouldn't be much. That is, some of it wouldn't be worth anything at all without drainage. A few spots that would be cultivated.

Q. Now with a levee to keep this water from coming through this trestle that went out in 1915, and with drains that would properly drain off the surface water that might fall, state what the condition of this land would be as to farming?

A. It would be just as fine land as a man would want.

Q. If a man would cultivate it it would make good corn and cotton?

A. I would say 90% of it if properly levied and drained would make corn and cotton just the same as what we are cultivating.

The Court: Is that land the least valuable now? I say is that land that would be [benefitted] in that way, is it
111 the least valuable now?

A. Well, I don't know either. I will take that back. I wont state it that way. A man can raise, if he gets one crop out of three, that land in the bottom would be worth more to the man that cultivated it, it would be worth more than if he got a fair crop on the hill. He will produce more stuff out of one crop in the bottom than three on the hills.

Q. With your knowledge of the conditions existing there, state what in your judgment would result as to these lands, in the event that they were properly protected by levees and drains?

A. My judgment is the whole business would be cleaned up. I know what I have got would be. I suppose the other fellow would too.

Q. You may state, Mr. Beeson, whether those lands are of a better quality than those surrounding Horatio?

A. It is a better quality than any other land around Horatio.

Q. Now what becomes of cotton that is raised in Horatio in the tributary territory thereto?

A. Put on track cars and shipped away.

Q. Over what road does it go?

A. Kansas City Southern.

Q. Is there any other road by which it can go over?

A. No other road unless some farmer would haul it to Foreman.

Q. How far would he have to haul it?

A. I think it is about 20 miles.

Q. What kind of road would he have to go over?

A. Well, it would be pretty bad a wet season of the year at least.

Q. Now Mr. Beeson, what percentage of the increase did you estimate there would be in the value of these lands in the district with the district and without the levee?

A. I would consider it one hundred per cent at least.

Q. Do you know from your experience and living around Horatio as you have, whether or not the drainage of this territory would be of benefit to the health of the community?

112 A. Well, I would think it would. It is a benefit to the health of any community to drain the surplus water out. I would consider it so.

Cross-Examination

By Mr. McDonough:

Q. How much land do you own in the district Mr. Beeson?

A. Four hundred and ninety acres.

Q. How much of that is in cultivation?

A. About 130 acres.

Q. What is the fair market value of that which is in cultivation?

Mr. Head: I object to that as not cross-examination.

The Court: He may answer.

Mr. Head: Save an exception.

Q. Of the lands in cultivation I am asking you about?

A. I consider the market value of land by whatever it will produce.

Q. I am not asking you that. Let me define market value and then you will know. The market value about which I am asking you is the value that the land will bring where there is a fair opportunity to sell it, a party wants to buy and a party wants to sell, not a forced sale, but a fair offering on the market?

A. I would say it would be worth fifty dollars an acre.

Q. And with the drainage it would be worth a hundred dollars an acre? A. It would take that to buy mine.

Q. That is your opinion of what it is worth?

A. Yes, sir.

Q. What are the value of the lands unimproved?

Mr. Head: I object.

The Court: He may answer.

Mr. Head: Save an exception.

A. The land that is being sold around there is selling around from eight to twelve dollars an acre in the woods.

Q. Wouldn't it be worth more than double if it was improved and drained? A. I should say it would.

Q. But if it would be doubled by the mere drainage and levees it would be worth 16 to 25 dollars.

A. It would if a man would clear it up.

113 Q. Including the levees and drainage you would place it at a hundred dollars cleared up, and uncleared it would be worth from sixteen to twenty-five?

A. I don't know hardly how to answer that question.

Q. You are one of the directors in the district?

A. Yes, sir.

Q. What did you assess the land at?

Mr. Head: Objection.

The Court: Overruled.

Mr. Head: Note our exception.

Q. You took the assessment as you found it on the books, didn't you? A. Yes, sir.

Q. What was that assessment?

Mr. Head: I object to that.

The Court: He may answer.

Mr. Head: Note our exception.

A. Various items.

Q. Take the improved land, what was that assessed at?

A. Well, it is assessed at from ten to fifteen dollars an acre.

Q. What is the unimproved land assessed at?

A. Anywhere from three to five and six, I think probably there is some $2.50. I am not sure about that.

Q. And you assessed all of them at six per cent, did you? I mean put six per cent on it? A. Six per cent, yes.

Q. And regardless of where the land was located?

A. Oh no.

Mr. Head: I object to the question if the court please, for the reason that he did not put anything on it.

The Court: He may answer it.

Mr. Head: Note our exception.

Mr. McDonough: As I understand it, the statute authorizes an assessment to be made as high as six per cent. That is the maximum, so that as a matter of fact the Board does

exercise a discretion as to the amount. That is what your answer is, that you assessed all of them at 6 per cent.

114 Mr. Head: Six per cent of what we find on the assessor's books of all property we find in the district. That is, the way we assessed it that time; next year it may be more or less.

Q. Have you built any levees or drains at all?
A. No, sir.
Q. Have you done any construction at all? A. No, sir.
Q. Who is your secretary? A. Mr. G. A. Henry.
Q. Is he here? A. Yes, sir.
Q. Has he got the books? A. Yes, sir.
Q. Have you held meetings? A. Yes, sir.
Q. Do you know whether they are here?
A. He has got them; I don't know whether they are here or not.
Q. Have you framed any plans of levees?

Mr. Head: I object to that if the court please as not being cross-examination.

The Court: What is the object of it Mr. McDonough?

Mr. McDonough: To my mind the most vital thing in the world. They are trying to collect money; they are going to collect it. We allege the whole thing is void. That raises the question of their good intention and everything of that kind.

Mr. Head: The trouble about Mr. McDonough's contention is that he is alleging certain things which I have prepared to meet and one of them is that it is invalid, of which this isn't one.

Mr. McDonough: It is one. In other words, before they can assess anything. We have got a right to an injunction if I can prove that by him they are not entitled to take this money, even if I am wrong on every other question.

The Court: You mean you were going to ask him if he is just going to keep that money? You may ask him that.

Q. Have you formed any plans for any levees?
A. Yes, sir.
Q. Have you adopted them? A. No, sir.
Q. Then you have not agreed on any plans?
A. We reserved the right to make some changes.

You haven't any record showing that you have agreed
on any plans? A. No, sir.
Q. You don't know whether you are going to build a
levee—there is nothing in that board meetings to show
ou are going to build a levee between the railroad and
ver?
Yes, we have the survey made and the estimates made.
Have you adopted that plan?
We haven't adopted it yet, no.
Have you adopted any plans for drains running through
nter of that district? A. No.
Do you know where Pond Creek is? A. Yes, sir.
It runs through the district? A. Yes, sir.
It is sluggish? A. Yes, sir.
That is very fertile soil along in there?
Some of it is.
That is the soil you were talking about while ago?
75% of it is good black sand loam.
A good deal of that land if cleared up and drained
produce two bales of cotton to the acre in an ordinary
A. I haven't seen any of it that would do that.
Well, it will produce a bale to the acre?
It might do it.
In a fairly good year wouldn't it produce a bale to the
A. Some of it would.
There is very little land between the railroad and Little
from Neal Springs down to the steel bridge, isn't there?
Not much.
If you built a levee through there it would take up all
and, wouldn't it?
It would take a good strip of it. There wouldn't be
left.
The object in building a levee through there is to re
lands in the southern end of the district? A. Yes, sir.
The benefit will come more to the lands in the south
art of the district?
A benefit to all of it inside of that district.
It wouldn't benefit the lands that are taken on the east
side?
A. It will benefit what is left between there.
Q. Will any be left?
No, it will leave about thirty acres on my land.
Do you own the land between the railroad and the
? A. Yes, sir.
How much land do you own in there?

A. Well, there is about—really I don't know just how much there is in there. In cultivation there is something near thirty acres.

Q. Mr. Beeson, Mr. Ethridge owns some land in that district also? A. I think he did own a forty in there.

Q. Dr. Henry is the other commissioner? A. Yes, sir.

Q. He owns land in there?

A. I think he owns 240 acres. I wouldn't say that positively because I don't know; something like that though.

Q. In your plans you provided that the levee should run over your lands between—that you own between the railroad and the river? A. Yes, sir.

Q. Did you provide any damages in there for that land?

A. I don't know; I have not claimed any.

The Court: What is the object of that?

Mr. McDonough: I think it is admissible in view of the cross-examination made by counsel on the other side. If the court thinks it isn't I withdraw it.

Redirect Examination

By Mr. Head:

Q. Mr. Beeson, you did make some plans of this district and in those plans you don't know whether you ran an independent levee or adopted this road?

A. Well, we have talked the matter over and while we haven't positively adopted the plans to join the line on to the public highway, but we did have the estimates on that.

Q. And you made all your arrangements to sell your bonds? A. Yes, sir.

Q. Expecting to build the levee around the land?

117 A. We reserved the right to change that.

Q. Where was the other line?

A. It went around that highway and came in on that detour.

Q. The only thing that wasn't settled the reservation that some changes might be made thereafter?

Mr. McDonough: I object to that. They have got minutes. He said they have not adopted any. Mr. Head's question indicates that they have. If they have they ought to be here.

Mr. Head: I am merely cross-examining him on that proposition.

Mr. McDonough: I notify counsel now I shall ask the defendants to produce their records.

The Court: My recollection is that Mr. Beeson stated that they had not yet definitely adopted any plans. Now then what is your question?

(Question re-read)

The Court: I think that assumes something contrary to his statement: that assumes that they did make plans.

Mr. Beeson, you may state whether you have in fact agreed to put a levee west of the right-of-way of the Kansas City Southern Railway, whether that has been definitely agreed on?

A. Well, in this way it has been agreed on. We have not made up our mind only that we have had the engineers to run that location and give us the estimate on it, but we haven't —it don't show in our minutes of any settled fact that we are going to put that levee there, only from the bill, that is all.

Q. You mean the law?

A. Well, the law gives us the right to put it there, and if I understand the matter we can make any changes that we want. We have not decided exactly what spot of ground we will put it on.

Mr. McDonough: Your Honor, I want to raise this question at this time. I ask the court to require the defend-
118 ants Beeson, Ethridge and Henry to produce the minutes of their meetings. I think that under this testimony I am entitled to it. Now if there is any expense attached to it I am willing and ready to pay it. They are either here or at Horatio. If necessary I am willing to pay the expenses of going after them. I think the minutes in view of what is going on, ought to be here.

The Court: What do you say, Mr. Head? Do you object to that?

Mr. Head: They are entitled to them if they want them.

The Court: Let's have an understanding now so that hereafter there will be no question about what is decided upon.

Mr. Head: We will let Dr. Henry go after them when they furnish you with a ticket there and back.

Plaintiffs waived production of these records and the objection on account of their absence.

Q. Mr. Beeson, I ask you the simple question if you had not decided to put that levee west of the railroad as it now stands?

A. Well, we have talked the matter over with ourselves with the expectation of doing it, yes.

Q. Well, didn't you have estimates made?

Mr. McDonough: I want to object to that. That involves what is in the minutes.

The Court: Well you can examine the minutes and then you can move to strike it out if you want to.

A. Yes, we have decided to build the levee where the engineer made the survey, but not go so far with it as the original survey connect on to the highway in place of the hill.

Q. You may state whether or not that would still be west of the railroad in the district?

A. That would be west of the railroad, yes, sir. We haven't had any minutes settled on that however. Now the minutes is not going to show that we have done that.

119 Mr. McDonough: Well, you have not done it then.

Mr. Head: Your present intention is to build on the line that you have indicated? A. Yes, sir.

Cross-Examination

By Mr. McDonough:

Q. That is your intention? A. Yes, sir.

Q. But you haven't had any meeting settling that question? A. No, sir; we haven't.

Q. You don't know whether when you get together to settle that whether you will adopt that or not?

A. I have every reason to believe it.

Q. When was the last time you had a meeting?

A. Well, we haven't had a meeting—well, I couldn't recall it just now. The last time we had a meeting was when we had a meeting and arranged to sell the bonds.

Q. When was that?

A. It was some time along last year, I believe.

Q. 1917? A. Yes, sir.

Q. Have you had any meeting under the act of 1917?

A. Yes, sir.

Q. Since that act was passed? A. Yes, sir.

Q. When was that? A. Right after the act was passed.

Q. Do you know when the act was passed?

A. I couldn't remember just what month.

Redirect Examination

By Mr. Head:

Q. Have you had any line of levee surveyed east of the railroad? A. No, sir.

Recross Examination

By Mr. McDonough.

Q. You say you haven't had anything done east of the railroad?

A. Well, there is a line down the river. They have surveyed a line down the river from the bridge.

Q. From the steel bridge across Little River?

A. Yes, sir.

Q. Did they connect that with the dump of the Kansas City Southern? A. I mean from the trestle.

Q. From which trestle?

A. From the trestle next to the river; from the north end of the trestle to the approach of the steel bridge.

120 Q. Do you remember how long that trestle is?

A. No, sir.

Q. Your survey there then extended from the south end of the dump?

A. From the south end of the dump; somewheres around there.

Q. Your purpose was to connect on to that dump was it?

A. Yes, sir.

Q. Do you know how high you intended to build that, how much higher than the railroad? A. No, sir.

Q. How high is the railroad rail there from the ground?

A. I couldn't tell you; I never measured it.

Q. Can you give any idea about it?

A. I suppose 14 feet; or ten or twelve feet; I don't know just how high it is.

Witness excused.

G. B. PRIDE, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. What is your name? A. G. B. Pride.

Q. Where do you live? A. Horatio.

Q. What business are you engaged in?

A. Mercantile business.

Q. How long have you been in the mercantile business?

A. About twenty-five years.

Q. You may state whether or not you have had experience in shipping in and out of Horatio during the past ten or fifteen years? A. Yes, sir; I have.

Q. State whether you have been at the head of any sales organization there?

A. No, that was my brother that was at the head of that.

Q. Were you in that same business?

A. Yes, sir; I have been interested with him. He was really at the head of the sales agency of that truck and fruit association.

Q. Has your experience been such as to testify as to
121 what becomes of the products raised in and about Horatio, Arkansas. A. Yes, sir.

Q. What becomes of the fruit products raised in and about Horatio?

A. Well, all of it that is raised for the market is shipped out of there over the Kansas City Southern Railroad.

Q. Are you acquainted with the lands lying in this levee and drainage district?

A. Some, yes, sir.

Q. What is the general character of that soil, Mr. Pride?

A. Well, I would judge—you mean as to whether it is wet or dry?

Q. No. What kind of soil is it?

A. It is good. That is, I call it good.

Q. Is it hilly soil?

A. No, sir; it is bottom land.

Q. Do you know about what per acre the yield would be of that land if it were protected from the waters by a levee and properly drained by ditches?

A. Well, I suppose you would want an average?

Q. An average, yes sir.

A. Well, my judgment would be that the average would be about half a bale of cotton and forty bushels of corn. That would be an average.

Q. Mr. Pride, what are the principal crops grown in and around about Horatio?

A. Well, in the bottom lands, corn and cotton.

Q. Any cantelopes? A. Some, yes, sir.

Q. What becomes of all the cantelopes, or practically all of them that are raised in the vicinity of Horatio?

A. They are shipped out over the Kansas City Southern.

Q. What becomes of the product of the cotton raised in and about Horatio?

A. It is all shipped out.

Q. State whether or not this drainage district is entirely tributary to Horatio itself?

A. Yes, sir.

Q. Is there any chance for that cotton and stuff raised for the market to be shipped out other than over the Kansas City Southern?

A. Well, not unless it would be hauled on wagons to some other road.

Q. How far is it to the nearest point where you
122 could reach your market by any other line of railroad?

A. The other nearest point would be the Frisco at Foreman which would be some fifteen or twenty miles, I would judge. And the M. D. & G. over at Rarona, which would be the same distance.

Q. You may state whether your experience in the mercantile business at Horatio has been such as to enable you to state whether the tonnage coming into Horatio has increased by reason of the tonnage going out in any way?

A. It has, yes, sir.

Q. Just explain that to the court.

A. Well, of course, the tonnage going out of there brings in more money and if the people have more money they buy more merchandise.

Q. Where do the merchants in Horatio get their merchandise?

A. They get it brought to them over the Kansas City Southern.

Q. You may state whether the merchants at Horatio obtain their goods over any other line than the Kansas City Southern?

A. They do not. That is, of course, they come over connecting lines—lines that connect with the Kansas City Southern at different points.

Q. I am asking you how it gets in there?

A. It comes in there over the Kansas City Southern.

Q. What is the nearest connecting point with the Kansas City Southern from any other railroad?

A. Ashdown.

Q. How far is it from there to any other road north that brings in any merchandise for merchants?

A. That is at Howe, Okla. and Poteau. It connects with the Rock Island at Howe and the Frisco at Poteau.

Q. How far north would that be from Horatio?

A. Well, I don't know. I would judge that it is something over a hundred miles to Howe.

Cross-Examination

By Mr. McDonough:

Q. Are you engaged in the mercantile business?

A. Yes, sir.

Q. General merchandise? A. Hardware now.

123 Q. You have been in the general merchandise though?
A. Yes.

Q. If all that land was developed down there it would increase your hardware business?

A. Yes, sir.

Q. You carry a pretty good stock of hardware do you not?

A. Yes, sir; I do.

Q. And it would increase the business of the clothing and dry goods stores too?

A. Well, now I said it would increase my hardware business, it would increase the hardware business of the community.

Q. It would increase yours if you kept pace with the other people?

A. I judge it would.

Q. Every man there would have his business increased?

A. Yes, sir; it might cause other men to come in there.

Q. It would cause competition? A. Yes.

Q. Wouldn't that build up the town? A. Yes.

Q. Wouldn't it make your real property worth more?

A. Yes, if we didn't have the competition.

Q. The greater demand there is for your goods the more your goods are worth, isn't it?

A. Yes, sir.

Q. Horatio is in the district is it?

A. No, sir.

Q. It is right on the edge?

A. It is right close to the district.

Q. The whole town is just left out? A. Yes, sir.

Q. But it gets the benefit of it just the same?

A. It would get some benefit.

Q. How many stores are there?

A. Well, I would have to count them up a little bit.

Q. Well, what size town is it?

A. About a thousand people there I judge, inside of the corporation.

Q. Does a good business, doesn't it? A. Yes, sir.

Q. How many banks there? A. Two.

Q. It does a large trade around in that community?

A. Yes, sir.

Q. Cotton ginning establishment there?
A. Yes, sir; there is a gin there.

124 Q. The cotton that is ginned there comes from all of the surrounding country?

A. Yes, sir.

Q. And this improvement district would extend from right at the city limits of Horatio down some five or six or seven miles, wouldn't it?

A. I think so, yes, sir. I am not familiar with the lines of the district.

Q. Do you know what section Horatio is in?

A. Thirty-six, I think that is it.

Q. And the proposed boundary comes within a half mile of the center of Horatio?

A. I think so.

Q. Does it come to the corporate limits of the town?

A. Well, I don't know sir as to that for sure.

Q. Do you know of any other business in town there that would be improved and helped out by the building of the levee and the drainage district?

A. Any other business that would be helped and increased besides my own?

Q. Besides your own and the banks and the other stores?

A. Yes, sir; it would help the gin business.

Q. It would help the ginning business very materially?

A. Yes, sir; I think so.

Q. It would open up a world of cotton land?

A. Yes, sir.

Q. The idea is it would bring prosperity to everybody?

A. I think so.

Cross-Examination

By Mr. McDonough:

Q. Mr. Pride, do you know whether the Kansas City Southern Railway in that vicinity in order to get tonnage, extended a line out into a large orchard for the purposes of getting to haul that freight?

Mr. McDonough: The only objection I have to that is it is bringing in an issue not relevant and consuming time for nothing. That has been an absolute failure and loss to us.

Q. How much all told of siding and main line did they put in to get to that orchard you speak of?

125 Mr. McDonough: That is objected to.

The Court: How is that material?

Mr. Head: Of course, I have not got any expert railroad men here. If I can show that these people are after ton-

nage and that we are going to increase that tonnage that would be competent.

The Court: Isn't that a matter of common knowledge?

Mr. Head: I want to show that they wanted it so bad that they go to expense to get it.

The Court: I think that is a little too far.

Mr. Head: Save an exception. I offer to prove by this witness that they built into the orchard at Horatio the line and track switches and sidings making a total of five miles. That was several miles north of Horatio.

Cross-Examination

By Mr. McDonough:

Q. Well, how much north of Horatio was it Mr. Pride?
A. I would judge about three miles.
Q. You bought all that yourself, didn't you?
A. I bought part of it.

Mr. Head: I want to save an exception Your Honor to your ruling. I don't know whether the stenographer got it. At this point, if Your Honor please, I want to move to cut out all the cross examination of the witness Beeson with reference to the location of the levee and the plans in regard thereto as being incompetent, irrelevant and immaterial, and also for the reason that it is wholly without the pleadings in the case.

The Court: The motion was overruled. Mr. Beeson is a member of the board of the district. I think it is competent to make the inquiry.

Mr. Head: Save an exception to that ruling. Your Honor, right at the first of this examination I think I objected to something and I forgot to save my exception to it.

The Court: All right.

126 By Mr. Head:

Q. I want to ask one other question. From your knowledge of conditions of things around Horatio generally you may state what in your judgment would result with reference to the land in this drainage district, if levees and drains were put in there to drain them out, what would result with reference to the clearing or not clearing of this land?

A. It is my opinion that it would be put in cultivation just as rapidly as possible.

Q. You may state whether or not the character of this land in this district is better than other lands around Horatio?

A. It is more productive than hill land. I don't know that it is any better grade of land than other bottom lands.

Q. Most of those lands around Horatio are hill lands?

A. Yes, sir.

Witness excused.

JOE GRAER, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Your name is Joe Graer? A. Yes, sir.

Q. Where do you live? A. Horatio.

Q. How long have you lived there? A. Since 1889.

Q. What is your occupation? A. Farming.

Q. How long have you been engaged in that business?

A. All my life.

Q. State whether or not you are familiar with the lands in this drainage district at Horatio?

A. Yes, sir; I have known it a long time.

Q. What is the general character of the soil?

127 A. Well, there is two kinds of soil there; there is a white clay and then there is a loam.

Q. How would you classify it as to hilly or bottom land?

A. Bottom land.

Q. What in your judgment, provided these lands were levied and drained, what would be the fair yield of land in this district?

A. Well, it would produce 65 bushels of corn, and a bale of cotton if properly worked.

Q. You may state what the principal crops were in and around Horatio? A. On the bottom land?

Q. Yes, sir. A. Corn, cotton and hay.

Q. What becomes of the cotton raised at Horatio?

A. They haul it down there and sell it and ship it out over the Kansas City Southern.

Q. To what town is this territory in that district tributary? That is, where the trade would go? A. Horatio.

Cross-Examination

By Mr. McDonough:

Q. Are you a merchant Mr. Graer? A. No, sir.

Q. Farmer? A. Yes, sir.

Q. Have you any interest in any stores at Horatio?

A. No, sir.

Q. Or banks? A. No, sir.

Q. Do any business at Horatio at all of any kind?

A. I buy what little goods I have to buy there.

Q. You live in Horatio? A. Yes, sir.

Q. Do you own any lands in this district? A. Yes, sir.

Q. How much land do you own?

A. About five hundred acres.

Q. You spoke of your land, as I understand your answer, that if that land was improved in that district, this bottom lands it would produce 65 bushels of corn per acre?

A. Yes, sir; I have made it two years.

Q. On lands already in cultivation? A. Yes, sir.

Q. What are those lands worth, the lands in cultivation now?

128 Mr. Head. I object.

The Court: Overruled.

Mr. Head: Save an exception.

A. The land already in cultivation is worth a hundred dollars an acre.

Q. What is the same kind of land worth not in cultivation?

A. That depends on how close in it is. It ranges anywhere from 13 to 35 or 40 dollars an acre.

Q. How much increase would there be in the value of that land if it is drained?

A. Oh, it would be double anyway, all of it.

Q. Then if some of that land is worth 15 dollars an acre not drained and without cultivation, and then if it is drained the land would be worth thirty dollars an acre?

A. Oh, yes; that would be cheap for it.

Q. And the man that owns the land could afford to pay a good price for having it drained and get good returns for his money?

A. Well, it would just make it worth a great deal more.

Redirect Examination

By Mr. Head:

Q. You may state whether these tracts of lands that you spoke of as being in cultivation are solid bodies of land or whether they are broken patches?

A. They are patches between sloughs and so on. Occasionally a man drains a patch himself.

Q. And a man that owns the patch wouldn't take a hundred dollars an acre for it? A. No, sir.

Q. But he owns a lot of waste land as the conditions now stand? A. Yes, sir.

Witness excused.

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129 DR. J. A. HENRY, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Where do you live? A. Horatio.

Q. How long have you lived there? A. Since 1896.

Q. Are you familiar with the lands in this drainage and levee district? A. Yes, sir.

Q. How long have you been knowing them?

A. Well, I have been familiar with them about twenty years. I became familiar with them immediately after I located at Horatio.

Q. Do you know about what portion of the lands in cultivation in the district?

A. Well, it is a very small per cent, not much over 10% I expect.

Q. Now, those lands that are in cultivation, Doctor, you may state what portion of the lands are cultivated, that is, how they are located?

A. Well, the portions that are cultivated are portions naturally drained by deep sloughs, and places where they can drain in those sloughs.

Q. Are they in solid bodies capable of cultivation, are they large tracts? A. No, sir; not large tracts.

Q. What do you generally call them up there, call your |—| patches?

A. Well, yes; small fields. It won't compare with lands in cultivation on Red River. Probably we will have twenty or thirty acres in a patch. That is a pretty good patch.

Q. What is the condition of the land other than those patches?

A. Well, it is not practical to cultivate it on account of being susceptible to even light overflows and to undrained conditions, back water from the river and lack of drainage there.

Q. What effect on crops in that district was the 1915 overflow? What effect did the 1915 overflow have on the crops in the district?

A. Well, it destroyed most all of the crops.

Q. Do you own any lands in the district yourself?

A. Yes, sir.

130 Q. In cultivation? A. Yes, sir.

Q. Do you know from your experience what the character of the soil is? A. Yes, sir.

Q. What is it?

A. Well, we have a dark rich sandy loam land and then we have a land that has been water-soaked. It is a lighter colored land.

The Court: Is that the gray land? A. Yes, sir.

Q. What in your judgment would be the average yield of the lands in that district provided they were properly drained and levied?

A. Properly drained and levied and properly cultivated, I feel safe to say would be three quarters of a bale of cotton and fifty bushels of corn, one year after the other.

Q. Do you know the owners of that property?

A. Well, I know a good many.

Q. State whether the lands are owned by people in Horatio or in the vicinity?

A. I think the majority of the land is held by people in that vicinity. At one time it was owned largely by land companies but it has been sold out quite a bit and most of the land is owned by individuals is smaller [arteks].

Q. From your judgment of the conditions there, state whether in your judgment if those lands were properly drained and levied, if they would be put in cultivation?

A. Every owner I have had the opportunity of hearing talk about it would. If it is drained I have every reason to believe it will be put in cultivation rapidly.

Q. Doctor, you may state whether or not the Board has agreed upon plans for a location of the levee on the west of the Kansas City Southern Railway?

Mr. McDonough: I want to object to that on the ground that the minutes of the meetings are the best evidence of what the board has done.

The Court: That is true. I understand that the
131 minutes will be produced. I think that is very much like having books of accounts where they are available.

I understand they will be produced here by tomorrow morning. I think the witness may answer and if it turns out that the books are not produced, then you may take such steps with regard to the testimony as you see fit.

Q. State what has been done by the board in that regard?

A. We have, in accordance with the bill passed, a preliminary survey, not a locating survey, but we had an estimate made that we could form a tentative plan by which we could arrange to sell bonds, so that we could get an idea of the amount of money it would be necessary to raise to build this levee. That is my understanding of it. That would be a locating survey. We had made arrangements with a bonding company until this suit was filed and of course, we were held up by it. The bonding company forced us to hold it up as a matter of course, in the face of a law suit.

Q. Where was that levee located with reference to the track of the Kansas City Southern Railway?

A. Why, it was our idea that this levee would be located somewhere in the neighborhood, making some minor change in the preliminary survey west of the railroad from the point connecting with what is known as the Jefferson Highway south, and then on east and south to the river.

Q. That is on the west side of the river is it not?

A. From the highway down to the Little River bridge is west.

Q. Is that the survey that was made by Mr. Christian and his office? A. Yes, sir.

Q. That is the survey that you referred to? A. Yes, sir.

Q. Why haven't you proceeded with the plans and definitely agreed on them?

A. Because we had notice from the railroad company that they were going to contest it and the bonding company refused to go further in the sale of the bonds.

Cross-Examination

By Mr. McDonough:

Q. Doctor, you haven't formally located it?

132 A. No, sir; there has been no location survey.

Mr. Head: Is Mr. Etheridge a member of the Board?

A. He is not now.

Q. When did he go out?

A. He went out on account of having to go to France. He is in the army.

Q. When did he go?

A. Well, it was some time, I believe in the fall of 1917, or perhaps he didn't go until after 1918. I don't remember, but it was late in the year.

Q. Has he a successor?

A. We had Mr. O. L. Edmondson appointed.

Q. When was that done?

A. I can't recollect just exactly. We wrote the County Judge and asked him to do so, and he did so.

Q. The plans that you referred to are the plans that the engineer has worked out a tentative plan looking to what should be made whenever you got to it?

A. Yes, sir. We went far enough for them to give us an approximate estimate by which we could look forward to issuing bonds.

Q. In those plans you considered using the Jefferson Highway as a part of the levee?

A. Of course, in making the preliminary survey we went over that, but after the plan was put to us this Jefferson Highway it would have been useless to have gone by that and we took up the idea of connecting there and so made this estimate when we were dealing with those bond men.

Q. It was your idea then to use the Jefferson Highway?

A. Yes, sir.

Q. But that has not been formally done by resolution and by any meetings of the board?

A. I don't think so.

The Court: Has the Jefferson Highway been constructed through the district?

A. Yes, sir.

Redirect Examination

By Mr. Head:

Q. Are you one of the commissioners of the Jefferson highway? A. Yes, sir.

Mr. McDonough: Dr. Henry, you say you had an
133 estimate made. What was that estimate?

A. I don't remember. I couldn't give it to you.

Q. How much taxes were to be collected, do you know?

A. We were to collect a tax in order to—

Q. How much was the total amount?

A. I say I don't remember exactly that amount.

Q. How many years were you going to collect it?

A. I forget whether it was 20 or 25 years.

Q. You were a member of the board? A. Yes, sir.

Q. And named in the act of the legislature?

A. Yes, sure. I don't want to make a mistake. Some times my memory might not be as clear because I have other business to attend to.

Q. You can't give any idea of the total amount you had in mind to collect?

A. Why, roughly estimating, it was somewhere in the neighborhood of $75,000.00 I think. I would not be sure, I have had so much of this highway proposition to figure with I may get it mixed with that.

Q. More than one half of that was to come out of the Kansas City Southern Railway?

Mr. Head: I object to that. Nobody can tell what the commissioners assessment will be on any of these lands.

Mr. McDonough: I don't agree with counsel on that because they went to the limit of the law the first dash out of the box, therefore, it is easy to tell what it will be.

The Court: How is that a criterion of what they are going to do hereafter? If it is, why we have already got it.

Mr. McDonough: They say it is not so. I am willing to accept their statement about it.

Q. How much was it a year, did you say, in your proposed plan?

A. I had not figured it out by the year. I said I thought the estimate of the cost of the levee was somewhere
134 about seventy or seventy-five thousand dollars.

The Court: That is just the cost of the levee, is it?

A. Yes, sir.

The Court: Outside of that you had to take care of the overhead expenses? A. Oh yes.

Mr. McDonough: Didn't you plan to collect something over seven thousand dollars a year? A. Possibly we did.

Q. Then for twenty years, that would be $140,000.00?

A. That would be about twice the money we get.

Witness excused.

C. S. CHRISTIAN, a witness sworn for the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Your name is C. S. Christian? A. Yes, sir.

Q. What is your business? A. Civil engineer.

Q. How long have you been engaged in that employment?

A. About eighteen years.

Q. Are you a graduate of any institution?

A. No, sir.

Q. Did you ever take any course in civil engineering anywhere? A. No, sir.

Q. What is your practical experience in that work Mr. Christian?

A. Well, I spent about four years in railroad location construction. I spent two years on the Mississippi river in the employ of the War Department on surveys. The balance of the time I have been on levee and drainage work.

Q. How many years all told have you been in the levee and drainage work? A. Twelve years.

Q. Where have you been living during that time mostly?

135 A. A part of the time I lived in northeast Arkansas. I have been in Texarkana about seven years.

Q. Mr. Christian, you may state the first drainage project with which you were connected, drainage or levee?

A. The first was the St. Francis Levee district.

Q. State what area was covered by the St. Francis Levee district protection?

A. I don't remember. Three or four million acres; I have forgotten just what it was.

Q. Was that a very large project?

A. That was a levee principally at that time. Later on I was on a drainage district of 243,000 acres.

Q. How long did you work for the St. Francis district?

A. I was in the employment of the Government at that time.

Q. How long did you work for them?

A. Well, I don't remember the exact time. I worked for them one time and went off on some other work and came back and worked for them again.

Q. In what capacity were you? A. Resident engineer.

Q. What does that mean in simple language?

A. That was almost purely maintenance on that work.

The Court: That means that the levee had already been constructed?

A. The levee had been constructed and it was necessary to enlarge it.

Q. Once you say you had charge of the drainage district covering 243,000 acres? A. Yes, sir.

Q. What drainage district was that?

A. Drainage District No. 9.

Q. What county? A. Mississippi County.

Q. How long were you engaged with that and in what capacity?

A. Well, altogether I was connected with them about three years. About a year of it I was chief engineer. We got it tied up in court until we got the new drainage law through. In the meantime I had gone over on some other work and this work was taken over by the American Engineering company. And I came back and assumed my occupation under them.

Q. What was the next project with which you were
136 connected?

A. The ..... River Drainage District, Butler County, Mo.

Q. What size district was that?

A. About 300,000 acres.

Q. What amount of money involved in that district? I mean by that to get at the extent of the work?

A. About a million and a half. They just let the contracts on it and it has been tied up in court several years.

Q. What position did you hold with that?

A. Locating engineer.

Q. What do you mean by locating engineer?

A. I made the surveys, designs and located the levee along the river. There was two parties out. I had charge of the St. Francis levee.

Q. How long did you say you were connected with them?

A. Well, only until we completed our survey, for a period of five or six months.

Q. Then what district were you connected with after that?

A. Miller County Levee District No. 2.

Q. How many acres of land protected by that district?

A. 92,000.

Q. What amount of money involved in that district?

A. I expect altogether about $600,000.00.

Q. What was the length of that levee in that district?

A. Forty-two miles.

Q. What was your connection with that district?

A. Chief engineer.

Q. Do you still hold that position with them? A. Yes, sir.

Q. What other levee districts have you had connection with since you have been in Texarkana?

A. Bowie County Levee District No. 1. That is nine miles in length and protects ten thousand acres of land; Garland Levee district there is 25 miles of levee and protects 43,-
000 acres of land. Red River Levee District No. 1 is
137 over in LaFayette County and there is about 24 or 25 miles of levee and about thirty thousand acres of land. Long & Berry levee District, thirty thousand acres of land and about 17 miles of levee I should say. That is now under construction. I am at present employed by all of those districts and in addition I have done some work for other similar districts.

Q. In what capacity have you been connected with those last named? A. Chief Engineer.

Q. Have you had any experience in drainage districts as well?

A. Well, yes, a part of the Miller District No. 2, there was some drains and a bayou had to be diverted there and rather than put in flood gates which are a dangerous proposition, we diverted them through a lot of canals, had about ten miles of canals. Since then we have organized and built three drainage districts in Red River bottom and Miller County.

Q. What area is covered by this district?

A. About 30,000 acres of all three of them and about forty miles of canals.

Q. What has been your office in connection with these drainage districts? A. I was chief Engineer.

Q. Has your experience been such Mr. Christian, that you can if called upon to figure the effect of closing up a natural water course in the construction of these levees and drains especially in Arkansas? A. Yes.

Q. In your work in connection with Miller Levee district, you may state whether or not you have closed up or had to close up a considerable stream?

A. Well, one was we cut off McKinney Bayou. There was about 46 square miles of drainage we had to take care of.

Q. Was that on Red River?

A. Yes, sir; we diverted this creek or bayou into Red River through the medium of canals.

Q. Now what volume of water, Mr. Christian, did that bayou carry as compared with the volume of water carried

by this bent or trestle in the Little River district? Whether more or less. I don't want it in figures.

138 A. Well, it would carry less than the opening would.

Q. Now how much more territory, if any, was cut off by this project, stopping up McKinney Bayou, that is that McKinney Bayou served, than is cut off by the drainage district? A. You can't compare those—

Mr. McDonough: I desire to object to the further examination. The purpose of all these questions is to show his qualifications.

Mr. Head: I withdraw the question.

Q. Mr. Christian, is Mr. Herman connected with you in any way, the witness on the stand here while ago?

A. Yes, he is an employe of mine.

Q. What is your employment, if any, with the Little River Drainage District?

A. I have been employed as engineer for the district.

Q. In that connection Mr. Christian, you may state whether you caused Mr. Herman to make a survey?

A. I did; I put a survey party in there and had the survey made.

Q. Have you had any experience in locating an overflow line? That is, the line of high water in any of these districts that you have mentioned?

A. In every one of them it is the same proposition.

Q. Can an engineer by going out in any manner discover that line?

A. Yes, with the high water marks in all these overflow districts a man can run a level line. It is not difficult to determine where the line of overflow is.

Q. Is it any trouble for an experienced engineer to go out and make these locations by these marks?

A. Not in the least.

Q. Have you had any trouble in locating them in any of these projects? A. None whatever.

Q. Did all of these projects in Miller County, Arkansas, and Bowie County, Texas, involve a line of this character?

A. They did.

Mr. McDonough: I object to that question. We are not trying the other cases.

139 The Court: That is true. That is put in by way of comparison and I think it is competent. He says it can be done and he expresses that by having done it under

similar circumstances. It might be brought out on cross-examination whether or not they are similar.

Mr. McDonough: I save an exception on the ground that the descriptions in the other improvement districts are not relevant or material in this one, and therefore it is not admissible to go into the descriptions in other drainage districts.

Q. Mr. Christian, can you tell from the books that were turned over to you by Mr. Herman and the data he turned over to you what kind of survey was made? A. Yes.

Q. From that data did you draw maps and locate the line?

A. Yes, sir.

The Court: Are those notes available?

A. They are on file in my office.

Q. Can you produce them here? A. Yes, sir.

The Court: Do you object to it because he should have the notes present?

Mr. McDonough: Yes, and I object to it further that if the notes were here he is not competent to go over it.

Mr. Head: Your Honor, I am not asking him about the notes.

Mr. McDonough: I do not think they are admissible even if they were here.

Q. Mr. Christian, have you in your hands the actual identical books turned over to you by Mr. Herman showing the survey that he made? A. I have.

Q. Have these books been changed in any manner since they left his hands and came to your hands?

A. Not in the least.

Q. What is the customary method of engineers in making up prints from notes taken by a surveyor?

Mr. McDonough: I want to object to that Your Honor.
140 Here is my idea. Mr. Christian cannot legally introduce a map based upon those notes.

The Court: You do not object to the identification of these books as being the ones that Mr. Herman had reference to.

Mr. McDonough: No, I do not object to that. I do not think that the books are admissible on the ground that Mr. Christian cannot use those books and make a map and say it is correct. In order to illustrate my point, the language of

the act is that it goes to the line of the hills. It goes to the line of the hills which is entirely above overflow. Now which line of the hills above overflow did Mr. Herman go to? Mr. Herman's testimony was that he followed the high water mark and therefore these are inadmissible. I do not want to consume the time, I just want the court to understand that I do not think they are admissible, and let them in over my objection.

The Court: All right.

Q. Mr. Herman made the notes that were turned over to you. Did you make a correct map of the district?

A. Yes, the map was made in my office and after it was made I checked it over as to its accuracy according to the notes which we had.

Q. That map is the exhibit of Mr. Phelp's testimony. Is that the map made by you of the district?

A. Yes, sir; that is a blue print off of my tracing.

Q. Now Mr. Christian have you figured up,—have you taken from the notes the elevation of the line at the point where the trestle occurred in the district on the railroad?

A. Yes, sir.

Q. What is the elevation of the district at that point, of the bottom of the sill at that point?

Mr. McDonough: You did not take it on the ground yourself, Mr. Christian?

A. No, I didn't do the work.

141 The Court: You were present when it was being done?

A. Yes, sir.

Q. Was it being done under your direction? A. Yes, sir.

Q. What can you say as to its correctness?

A. I believe it was.

The Court: Objection is overruled.

Mr. McDonough: Note our exception.

Mr. Head: May I state Your Honor, Mr. Herman has already testified that this survey was correct and that these notes that he gave to Mr. Christian were correct. Mr. McDonough makes no point of Mr. Herman identifying the particular books?

Mr. McDonough: I make the point as to its being evidence.

Mr. Head: I understand that, but you do not require Mr. Herman to come here and identify these books as the ones he turned over to Mr. Christian?

Mr. McDonough: No. But I say regardless of the books all the testimony is incompetent in the light of the act itself. And I want to say in addition to that that these notes themselves are not sufficient evidence to show that he went to the line described in the act of the legislature.

The Court: It simply resolves itself in this: That you claim that the act is too indefinite to define a line.

Mr. McDonough: I claim that, yes.

The Court: That is practically what you mean?

Mr. McDonough: Yes. I do not deny that these books are the books made by Mr. Herman. I am willing to admit that, but I say these books are not admissible as evidence.

Mr. Head: I am not offering the books as evidence.

Mr. McDonough: Then if the books are not offered then the evidence which follows could not be because that would be deductions and reasonings from the books.

The Court: I think just this, that a man can make a statement from books. I took this from the books and have
142 the books present so that the statement can be attacked by someone, and I think this practically the same thing. I think it is competent. Overruled.

Mr. McDonough: Save an exception.

Q. I believe you have already stated that you made that map and that was the map introduced as exhibit 1?

A. It was made by other parties. I checked it over afterwards. I know it is all right according to the notes.

Q. I started to ask you about the elevation of the ground at the trestle there. Have you got that from these notes?

A. Yes, we have a cross section of that trestle taken since 1915 water. Of course the ground line varies to some extent. I think the lowest place in there is about fifty feet from the south end and it is 23 feet from the base of the rail to the ground.

Mr. McDonough: Under the trestle?

A. Yes, sir. The lowest of it under the trestle was 23 feet from the base of the rail.

By Mr. Head:

Q. Tell the court whether that is at a point where the natural surface of that drain was washed out or not?

A. It was where that was scowered out by the 1915 water and the bents went out.

Q. What is the elevation of the bridge at points where it was not scowered out?

A. It is about 12 feet higher. There is about 30 feet of that low ground, 23 feet below the base of the rail and this other is 12 feet higher, would make it 11 feet below the base of the rail. That is about the average. The bridge is 512.2 feet in length.

Q. What is the general fall if any in elevation to the eastern, southeastern boundary of the district?

A. You mean the high water mark?

Q. Yes, the high water mark at the bridge and the high water mark at the eastern boundary of the district?

143 A. The high water mark at that trestle was 327.5 and at the lower end of the district it is 307.7. That would be 19.8 fall in the high water mark of that trestle.

Q. What distance is that approximately?

A. Well, it is about 7 miles on an air line.

Q. Now what is the elevation of the trestle at the point where it went out as compared with the elevation of the bridge over Little River?

A. Well, on that steel span it is about 5 feet; the base of the rail is about five feet higher than the base of the rail on this trestle that went out.

Q. Now the high water marks, have you got the high water marks at the trestle and at the bridge too?

A. Yes, the high water mark at the bridge across Little River is 5.5 feet lower than it was at the trestle.

Q. That is 5.5 feet fall between the two openings?

A. Five and a half feet fall. Between the two openings the distance in there is about a mile and a half. It is five feet lower at the Little River bridge than it is at the trestle that was washed out.

Q. Fall in what? A. In high water surface.

Q. Now Mr. Christian, how do you account for that difference in the high water mark at those two points?

A. It is the natural fall in the river. The fact of the matter is if that trestle had been closed there would have been a greater difference than that. Perhaps a little more head, that is a little more shope between the trestle and the bridge

across Little River because the discharge through this trestle unquestionably lowered the stage of the river to some extent.

Q. Now Mr. Chirstian, I wish you would go on in your own way and state what elevations you took there of the water and at the various points you took it?

A. I have a record on this map of the high water level
144 at each fifty station below the Little River bridge. At the first fifty stations below the Little River bridge the high water was 3.52; at the first fifty stations down the river it is 3.20; there is a two foot fall in that fifty stations.

Q. There is a difference in the first fifty stations below the Little River bridge?

A. There is a fall of two feet. Now those stations are numbered according to the embankment line that was run down there for the location of the levee. The first was zero and the next 50 stations 1.6; now the next 1.8. In the next one there was a fall of a foot. You might say at that point there is a point extends out from the other side and the water running across there would naturally raise the water level on the lower side of that point. In the next fifty stations we have a fall of .7; in the next we have a fall of 1.9; in the next 1.1; in the next 1.6 feet; in the next one one foot even and in the next one 1.6 feet. That takes it to the lower end of the district. Continuing on down the river to say in section 1, township 11 south, Range 30 west, I have an elevation of 302.5; straight across country it is two miles from the end of the proposed district and the fall of 5.2 feet. That is in the Southwest corner of section 6. In the Northwest corner of section 8, in the same township and range we have a higher elevation of 300.8 which is 1.7 feet lower than the one just previously mentioned. That is on Pond Creek going back on to Little River. In the Northeast quarter of section 17, Township 11 South, Range 7 West, we have a high water mark of 299.1. It shows the influence that has had on this particular basin between the Cossotat and Little Rivers by the flood waters coming out of the Cossotat River. This basin is drained by Bird Creek and Pond Creek, the two unite about the middle of the basin.

Q. Where is that basin with reference to the eastern boundary line of the district?

A. At the nearest point it is a mile and a half.

145 Q. Mr. Christian state whether any of the water from this basin would back up over those lands with the levee as you have got it marked on that map?

A. No, there is only one way in which we could get any back water in there and that would be if we got an excessively high water over a period of ten days so that all the country would be flooded, it would back up to some extent over the

lower end of the district, but there would be absolutely no chance for it to get further than 2 miles from the lower end of the district on account of the extreme fall of the river itself.

Q. Now Mr. Christian, those sloughs and creeks that were mentioned by one of the engineers for the plaintiff, state what goes with the water that goes into those creeks?

A. You mean with reference to breaks in the hill lines?

Q. Yes, sir.

A. These creeks are merely run ways coming out of the hills and it is, of course, even during a period of high water when the bottom is flooded that these creeks flood. It is owing to the volume that is down in there. The drainage however is fairly open at this time. There are one or two that run along the edge of the hills that will have to be opened up by ditches because of the fact that as that land is opened up and put in cultivation there has been a lot of washing and this silt has filled the channels so that that channel will have to be cut or a new channel cut that will be outside of the influence of this deposit.

Q. From the elevations have you figured the velocity of the water at the highest elevation shown by the high water mark through that trestle?

A. Well, of course, we figure it. These are approximate only. It depends upon the coefficient you use and often the duration of the flood will govern the greatest velocity at any time. On a very rapid rise such as we have on Little River water would go through there with a very high velocity on account of not having filled up below, and on the crest of the rise it runs so much swifter than it does on a falling water. After the crest of it passes the current decreases. In
146 figuring the velocity of the water now under that trestle, and the volume, it depends upon the coefficient used. I use a coefficient which is usually used on channels in rather bad condition in figuring the discharge and the velocity through these various openings.

Q. Well, has your experience with the various levee and drainage districts shown you by so figuring you can get approximate result?

A. Yes, you can get the result sufficiently close so that we usually apply a margin of safety. I have not had any fail yet.

Q. Do you have this same proposition with reference to closing up openings and with reference to the volume of water being thrown under bridges in the Miller Levee district and Garland Levee districts?

A. Yes, I think that the evidence in that case shows that the levee district we cross sectioned with the openings under

the Kansas City Southern from the hills in Miller County to the hills in Sevier County, we had the high water mark during the maximum flood of 1908, and then after we laid the grade lines for our levees we used this volume of water that we figured came through there in determining the heighth to which it would be necessary for us to build our levees.

Q. I asked you about the Garland Levee District.

A. Well, we had the same proposition, well, not exactly in the Garland Levee District. In the lower end of Miller No. 2 we had the question up as to the extent it would raise the flood waters at their bridge at Garland City. We had any number of witnesses on that, both sides, at that time on that particular question.

Q. Have you also figured the volume of water going through this trestle where the bents went out?

A. Yes, I have made an estimate on the volume that went through there.

Q. Suppose that a levee should be put on the west side of that railroad sufficient to hold back all of the water that
147 came down at the highest water mark that you have been able to obtain, what volume of water would that add to the volume of water going under the bridge at Little River?

A. Well, it would add about 20% to the volume. And it would raise the water level according to my estimate between 2 and 2 and a half feet, the high water flood line.

Q. According to the high water mark as determined on the map there you may state whether or not that volume of water would be taken care of by the Little River bridge as it now stands?

A. I think it would. There is a small part of that Little River bridge, that is, the trestle approaches at each end that as far as carrying off any flood water in the past they have not done it. They have carried a small amount but it has run through there so shallow that the foundation would cut the velocity down to such an extent it would have no effect on the [ehighth] of the flood going through under the main bridge.

Q. Now Mr. Christian, you may state whether you drew a plan on which estimates were to be based for a levee in this district?

A. Yes, we made plans, profiles, estimates and submitted them to the Board of commissioners.

Q. I notice here upon the map that you have marked out what purports to be a levee line. You may state whether or not that is the levee as tentatively located by you?

A. That was a line run through there for the purpose of making an estimate on which to base an issue of bonds.

Q. You may state to the court if it would be feasible at all to run a levee across there to the east of that railroad dump of the Kansas City Southern leading into the line of the hills beyond the trestle where this bent washed out in the district?

A. Well, it would not be a feasible proposition for the district inasmuch as the cost would be prohibitive. If they were to build a line north and south from the river to the
148 hills east of the Kansas City Southern Railroad it would cost them more than all the balance of their system together.

Q. Why would that extra cost be added by going to the east instead of the west?

A. By staying to the west they can stay along on the high bank of the river. If they stay on the river bank they can get by with half the levee that would be required if they would go east of the railroad, and as far as the trestle is concerned, that is, this 512 foot bridge, it would not relieve matters any if it did flood over there it would [but] right up against this wall of levee on the other side. It would not affect it.

Q. In these plans that you have drawn how much above high water mark on that bridge is the levee proposed to be?

A. Proposed going 4 feet, about four feet over the high water marks we had at that time. It would be about two feet over the 1915 water, I believe.

Q. Now Mr. Christian, if that levee were built on the east side of the railroad to a heighth say 2 feet above the high water mark of 1915, a levee north and south from the river to the hills, what effect would that have upon the roadbed if you had an overflow like 1915, if the levee held?

A. It would put it over the top, however, there is a part of that we would have to go perhaps more than two feet over the 1915 water to hold it.

Q. You mean the levee might break if it were not more than two feet?

A. Yes.

Q. But if the levee was built high enough to take care of the water of 1915, with that trestle open?

A. It would make no difference whether it were open or closed, it would go right on over the top of the railroad, but the only difference would be a difference in elevation of the water surface on the two stations until it over-topped,
149 in case the bridge was closed. And if the bridge was open there would be a current going down through it

between the levee and the railroad dump down towards the river.

Q. What would be the effect on the levee of that current?

A. Well, with the levee well sodded I don't believe it would effect it any.

Q. Right there you may state in good construction of levees how they take care of the levees?

A. We sod it with bermuda grass to hold it.

Q. You have had considerable experience with levees here and sod in this country, have you?

A. Yes, sir.

Q. State what the result of sodding with bermuda grass is?

A. It holds it; it keeps it from washing and keeps it from wearing down, the water has no effect on it. We sod it and also graze it to keep out burrowing animals.

Q. In your judgment as an engineer, state whether the railroad would receive a benefit from the construction of the levee as proposed by the district to the west of the railroad?

Mr. McDonough: That is objected to because he does not show qualification to answer the question.

The Court: He is an engineer engaged in this class of work. He may answer.

Mr. McDonough: Save an exception.

A. Well, I would think it would be a benefit.

Q. In what way, Mr. Christian, would the benefit accrue?

A. Well, the increased tonnage, better health conditions and to some extent in the cost of up-keep and maintenance on that road.

Q. What do you mean by the cost of up-keep?

A. Well, they could, if they so desired; it depends altogether upon what they wanted to do in the matter—they could close their bridge and it is less cost to maintain—or at least they could shorten it very materially. It would give them reduced cost in maintenance.

150 Q. Mr. Christian, if the levee as proposed to be constructed should break west of the railroad opposite this trestle work that we have been talking about on the railroad, what would be the effect with reference to the volume of water that went through there supposing the overflow was the same as in 1915? Compare the volume of water that went through in 1915 and what would go through in the event there was a break?

A. That would depend on the size of the break. As a usual thing when you have just a simple break they never widen out

much so that would have very much less volume of water going through that trestle than you had in 1915. Of course, when your levee caves in as we some times have on these alluvial streams, you get a tremendous amount of water, but in that district the proposition of caving banks is practically eliminated. The banks are amply stable and even with a break the chances are that the break would never go to any considerable width. One thing, it would be a small levee and another thing the water never stays up to its maximum I think, for any greater length of time than 72 hours from the time it gets out of its banks until it gets back.

Q. You mean on Little River the flood period is usually about 72 hours?

A. Yes, sir; in the worst floods about 72 hours is the extent to which it overflows its banks.

Q. Mr. Christian, where with reference to the trestle work of the railroad approaching the bridge, does the levee connect with the railroad as proposed. I mean the bridge now across the Little River?

A. It was our intention in building across there just to hit it at the end of the trestle at the north end of the bridge. Connect up the dirt on one side and build on from the other.

Q. Well, would the levee be higher at that point than the top of the road bed?

A. It would be lower than the top of the roadbed.

Q. How much lower?

A. I don't know. I can't tell you right now but about
151 six feet.

Q. You mean that the line of the levee at that point would be six feet below the top of the roadbed?

A. Below the base of the rail.

Q. Then in the event that a high water [shoud] come, I ask you whether or not the water would run over this levee before it got to the top of the bridge?

A. Yes.

Q. How much margin would there be between the bottom sill of the bridge and the water before it would begin to run over the levee as proposed?

A. Now I don't know just the depth of that girder on that steel span there so I am not prepared to say what the difference would be, but I imagine the high water mark would be up pretty close to the bottom of the stringer. I have not the depth of that girder so I cannot say.

Recess to 7:30 P. M. of the same date.

M. W. MILWEE, being recalled by the defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Mr. Milwee you are familiar with the bridge of the Kansas City Southern or the Texarkana & Fort Smith whichever it may be near Horatio over Little River?

A. Yes, sir.

Q. What is the distance from the base of the rail to the bottom of the girder?

A. It is about forty inches.

Cross-Examination.

[—]

Q. From what to what?

A. Base of the rail to the bottom of the girder.

Q. You didn't measure it, did you? A. No, sir.

Witness excused.

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152 C. S. CHRISTIAN, recalled by defendants, testified as follows:

Direct Examination

By Mr. Head:

Q. Mr. Christian, assuming that the bottom of the girder from the base of the rail to the bottom of the girder on the steel bridge of the railroad over Little River is a distance of forty inches, how much clear space would there be under the bridge at the time the water was just running over the top of your levee as proposed?

A. Between four and five feet.

Q. Mr. Christian, you have stated that to build the levee north and south from the river to the hills on the east side of the railroad would be prohibitive in cost, I wish you would go into details in that matter and state why?

A. Well, because it would be through timber practically the entire distance. We would have to cross two or three cypress sloughs and go through some of the low ground which would run the expense of building it up very high.

Q. What would you estimate to be the cost of the levee constructed to the east of the line of the railroad from the river to the hills?

A. I presume that would cost in the neighborhood of about eight thousand dollars a mile.

Q. Well, how many miles are there?

A. I think it is two and a half miles.

Q. Would be about $20,000.00 if there is two and a half miles. What would be the cost of building the same line of levee on the west side proposed by the board at this time?

A. About two thousand dollars a mile.

Q. How many miles is it?

A. Figuring the same distance, two and a half miles, would make it $5,000.00.

Q. Now Mr. Christian, you have stated that you have had experience with levee work, protection against floods, for a long period of years. You may state whether or not the levee proposed to be located on the west side of this district—west side of the rail road of this district, would in your
153 judgment, be sufficient to withstand the floods even greater than that of August 1915?

A. Well, as proposed, the grade proposed in there, it would carry a bigger water than we had in 1915.

Mr. Head: There is a question of boundary in here that Brother McDonough has raised in the pleading that I want to take up and I want Your Honor to see it on the map. Mr. Christian, I am going to read the description of this district in accordance with the act of 1917 and I want you to point out to the court. Beginning where the north and south line passes through the middle of section 3, twp. 10, South, Range 22 West, intersects the bank of Little River; thence south to the north bank of said river thence east and south along the bank of said river to where it intersects the line between sections 10 and 11, Twp. 11 South, Range 31 West; thence north to the line of the hill which is entirely above overflow; thence northwesterly following said line of said hills, to the north line of section 2, Twp. 10 South, Range 32 West; thence west to the Little River; thence southwest and northwest along the line of said river to the point of beginning. Have you traced to the court that boundary line? A. I have.

Q. Does that boundry line connect up from the point of beginning to where it comes back to the point of beginning?

A. Yes, it does.

Q. The map that you have in your hands now is an exact copy of the exhibit 1 to the deposition of Mr. Phelps, is it not?

A. It is.

Cross Examination

By Mr. McDonough:

Q. You have pointed it out, the line that you traced on the map, didn't you? A. I did.

Q. You did not trace it on the ground?

A. No, I did not. It was under my personal supervision.

154 Q. Whether there is any line of hills along here where you traced the line, you don't know of your own knowledge?

A. I do; I have been on the ground.

Q. You said you didn't run it?

A. I didn't. That does not prevent me from being on the ground.

Q. When were you right there at the time the survey was being made? A. Yes.

Q. Did you help make the survey?

A. No, excepting I was present and it was made under my direction. I was present when a part of the line was run.

Q. You made the line then, as I understand it, at the high water mark?

A. Where the overflow line came along the edge of the hill.

Q. That is where you made it? A. Yes, sir.

Q. And that is where you followed it all around?

A. Yes, sir.

Q. Where the overflow stopped—the highest water mark?

A. Yes.

Q. That is the line you took? A. Yes.

Q. And that is the line you traced for the court on the map? A. Yes.

Q. You did not trace it on the ground all the way around yourself personally? A. No.

Q. You don't know how much of it you did go over personally, do you? A. No, I don't.

Q. Did you locate the high water mark yourself?

A. No, I didn't.

Q. You don't know what highwater mark was used do you, of your own knowledge as you didn't locate it yourself? You don't know whether it was 1910, or forty years ago or ten years ago or 1915?

A No, it was the highest water mark.

Q. Of your own personal knowledge you don't know?

A. All I know is it was the highest water mark of record up to that time.

Q. You got information from Mr. Herman that that is what he did? A. Yes.

155 Q. And he got his information, so he told you, from somebody else?

A. No, he got his largely from observation.

Q. But you were not with him when he made that observation in tracing that line? A. No.

Q. And that is what you directed him to do to follow that high water mark? A. It was.

Q. And that is the map that you have given here, that line follows the high water mark?

A. Yes, it follows the high water mark along the hill where the high water mark intersects the hill.

Q. It isn't the crest of the hill at all? A. Certainly not.

Q. You never followed the crest of the hill anywhere?

A. We did not.

Q. You followed the high water mark on the side of the hill as it rose up from the bottom? A. That is it exactly.

Q. And you got that information from Mr. Herman for the larger part of it? You did some of it but you have not yet told how much you did, nor how much you didn't do, and you can not tell how much you did or how much you didn't do?

A. No, as far as doing the actual instrument work myself, I did none of it.

Q. You can't, as I understand you, say that you located any part of this high water mark that is shown on here?

A. Well, in the sense of having made the survey, no.

Q. The line that you traced for the court is a line that has the numberings on it looking like a hill line, doesn't it?

A. Yes.

Q. It is the ordinary sign used for mountains or hills, isn't it?

A Yes.

Q. But it is not the crest of the hill at all?

A. No, we had no intention of following the crest of the hill.

Q. Then it doesn't follow the crest of the hill at all?

A. No, it does not.

Q. In order that I may not misunderstand you it was
156 your purpose and design to follow the highwater mark at the foot of the hill? A. Follow the line.

Q. It might have been at the foot of the hill or on the side of the hill, but it was to follow the high water mark?

A. Exactly.

Q. And that is what you endeavored to show on this map?

A. We endeavored to determine the [are] of land that was subject to overflow.

Mr. McDonough: Your Honor, I move to exclude the testimony of Mr. Christian as to the location, and the testimony of Mr. Herman, all of it on that subject, on the ground that it has not been relevant or material.

The Court: The motion is denied.

Mr. McDonough: Save an exception.

Q. Now Mr. Christian, with reference to the building of a line on the east side of the railroad, I believe you said that it would be about two miles and a half?

A. I think that is it.

Q. I mean not a line but a levee, that would be two miles and a half? A. I think so.

Q. That distance would be shown on this map? A. Yes.

Q. It would go through part of section 2, section 11, section 14, Twp. 10 South, Range 32 west, would it not? A. Yes.

Q. It would pass in not quite through 14 but nearly so. It would stop at the river, would it not? A. Certainly.

Q. How far away from the right of way of the Kansas City Southern did you figure on locating that?

A. I never figured on locating any line through there at all. I never considered the proposition at all.

Q. In giving your testimony while ago, where did you locate it in your mind?

A. Far enough away so that I would not disturb the right of way of the railroad company.

Q. All right, about how far? A. About 150 feet.

Q. Did you take any measurements or run any levels
157 or anything of that kind down there to see how much of a fall there would be?

A. Well, the land along there runs off some to the railroad, where the railroad was located and I believe you had your witness testify it ran 15 to 18 feet I think along there.

Q. Now then you spoke of a line shown by the figures and marks and stations west of the railroad that is marked out there on the map, isn't it? A. Yes.

Q. What is the scale of that map?

A. It is shown on here. One inch scales two thousand feet.

Q. Have you measured to see the distance if that line would run that your levee would be on that side from the point where it is shown there down to the bridge.

A. Yes, it is 157 stations down to the bridge

Q. What is that distance? A Three miles.

Q. Then it would be more than it would the other way?

A. Well, if built on that location.

Q. Would it be more than the other way?

A. If built on that location it would.

Q. You said a while ago it would be about the same, didn't you say that? A. When I made that reply—

Q. I say did you say it?
A. Your Honor I understood the—

The Court: Just answer the question Mr. Christian, if you said it.

A. I said it but I was considering a different line when I spoke of that from the fact that there was a highway built out there down to the river and it was intended when this highway was built to form a part of this levee system, and the levee would be a shorter line than the line you spoke of.
Q. You say a highway is built here and there. I wish you would locate it on the map.

The Court: Is that what you call the Jefferson Highway?

158 A. I believe the Little River bridge is located somewhere in section 10, I wouldn't be positive.
Q. I wish you would mark a letter A where you think that bridge is so that we can see it. And put a B at the other end where the Jefferson Highway crosses the railroad.
A. All right.
Q. That then represents the highway running from A to B approximately? A. Yes, approximately.
Q. Now then it is the intention to use that as a part of the levee is it? A. That is my understanding.
Q. Now if you had built or located the levee east of the railroad that would have left the railroad out of the district would it not? Provided you had made the boundary the levee? A. Certainly.
Q. Then you would not have gotten anything from the railroad? A. No.
Q. You are employed by the drainage district, aren't you?
A. I am.
Q. You are paid a contingent fee aren't you?
A. I handle it on a per cent basis.
Q. Your per cent is not due until the enterprise is executed? A. Yes, that is true.
Q. You are more certain of getting your fee the larger the amount of railroad property is placed on it?
A. No, sir; you are wrong. If I had wanted to run the cost of the work up I could have put it over there and made my fee more than when I put it on the other side of the railroad.
Q. But by putting it over there the people would not have built it? A. I don't know that.

Q. But by putting it over here you can tax the railroad and you are certain of getting your fee?

A. No, sir; that never occurred to me.

Q. Have you built anywhere else where you went five or six or seven miles where you went to get in two miles of railroad?

159 A. I don't know of any instance of the kind.

Q. Did you go all over this before the legislature passed the act?

A. No, the act was passed before I ever did any work.

Q. Do you refer to the first or second act?

A. Second act.

Q. You had not consulted with any of these property owners before the first act was passed? A. No, sir.

Q. Did you consult with them before the second act?

A. I did.

Q. Why did you take out all of this in the second act?

Mr. Head: I don't reckon he could answer why the legislature did those things.

Q. You had it done didn't you?

A. No, I didn't have it done.

Mr. Head: I object to that last question that he asked the witness.

The Court: I don't believe that is competent Mr. McDonough.

Mr. McDonough: It is cross examination in order to show his interest in the matter.

The Court: I understand, but the point is you are asking him if he had it done. You might ask him if he advocated it.

Q. Did you recommend that that be done, that this other territory be cut out? A. I did.

Q. Why?

A. Because of the expense of going ahead with the balance of it. At the present time I didn't think the value of the land justified the expenditure.

Q. This land was more valuable than this up at the other end? A. Not in my opinion.

Q. Far richer? A. Perhaps so.

Q. More fertile? A. I don't know that they are.

Q. Have you ever been down over that part of the country?

A. Oh yes.

Q. Isn't that the richest and best soil down in that part of the tract?

A. No, sir; some of the poorest land in that whole district.

160 Q. Where is it? A. On Pond Creek.

Q. Can you tell where the sections are?

A. No, I don't remember the sections.

Q. Is this some of the poorest lands down here in Section 10, 11 and 12?

A. No, that is pretty good land down there.

Q. How is one and two?

A. That is very good land.

Q. What did you leave this out for? Why did you recommend leaving this out?

A. Because if we came on down here we would have had to carry a much larger levee.

Q. Why a larger levee? A. More water.

Q. Why would more water get into it down there?

A. On account of the slope of the ground.

Q. That is level in there in sections 11 and 12, isn't it?

A. No it is not.

Q. Which [was] does the ground slope?

A. To the northeast.

Q. In 11 and 12 both, doesn't it? A. Yes, sir.

Q. And then you could have easily built a levee on that high line near the river just as you have got it laid out there?

A. That ground isn't so high along the river.

Q. Isn't it the same relative heighth above the river that it is by water?

A. No, sir, it is not.

Q. Do you know that that land in 11 and 12 never overflows?

A. I know it does.

Q. Next to the river I am talking about.

A. Yes, sir.

Q. I own the land in 11 and 12?

A. You have got some mighty wet land.

Q. How much yardage did you figure in order to arrive at the conclusion that this levee around here west of the railroad would cost $2,000.00 a mile?

A. I don't remember. I can't recall those figures.

Q. Can you give the figures showing how you arrived at a $2,000.00 a mile cost on that?

A. About 10,000 yards. It is a small levee, it doesn't

161 take much yardage to put it up. A lot of that levee wont have to be over four feet high.

Q. How wide?

A. We expected to make that two to one slopes, four feet of ground.

Q. Do you mean to tell the court that levee along there anywhere built four feet high would be four feet above the rails of the railroad?

A. I never said it would be four feet above the rails of the railroad.

Q. It would be below the railroad if you built it only four feet high, in section 11-10-32. It would be below the rails wouldn't it, if you built it four feet high about opposite that opening?

A. About 5.5 foot levee, that would then carry—

Q. The question I asked you will 5.5 foot levee raise that levee four feet above the rails?

A. I told you no, I don't think it would.

Q. All right. Would it raise it up to the rails?

A. It would be two feet below the base of the rail.

The Court: The top of the levee on the west side of the railroad would be?

The Witness: Two feet below the base of the rail at this particular bridge.

By Mr. McDonough:

Q. Then if the water came during high times [in] two feet of the top of the rail it would be a dangerous situation, wouldn't it, with a levee only that high?

A. Yes, if it gets up to the top of the levee.

Q. If it gets 18 inches it would be dangerous?

A. If it got 18 inches it would be six inches over the top.

Q. That would make it worse? A. Yes.

Q. That wouldn't be much of a levee?

A. Yes, it would be a pretty good levee because they only had that water once in forty years.

162 Q. Didn't you hear this witness testify today that the levee ought to be three or four feet above the rails?

A. No, sir.

Q. Mr. Christian, I want to call [you] attention to a mistake I think you made about the location of this road on this map. I will ask you if you have not located the Jefferson Highway at the wrong place? I will ask you if it isn't a quarter of a mile north of where you have located it and if it does not cross the detour about 500 feet north of the station of Neal Springs?

A. It crosses the detour about 500 feet north of the station.

Q. You located it 500 feet south of the junction?

A. Yes.

Q. Of the detour with the old line and now you admit that it is 500 feet north of it?

A. Yes.

Q. You made a mistake on that? A. I did.

Q. Is it the intention to use that Jefferson Highway down to the bridge across Little River in section 10, Twp. 10 South, Range 32 West?

A. I understand that that is the intention.

Q. Then you wouldn't have built the levee any higher than the highway?

A. No.

Q. Then the highway is lower there than the railroad rails isn't it?

A. No, I don't think it is.

Q. Well, is it level with the railroad rails where it crosses the rails?

A. Just about.

Q. Have you got anything showing the grade from the bridge in section 10 up to where the Jefferson highway crosses the detour?

A. No, I have not run the levels over it. I have been over the ground but I have not any grade lines.

Q. Then if you used the highway as a levee you will cut out the detour and the part of the old line and leave it to be overflowed with water wont you? You can see that on the map here, you wont use the old line but cut out a part of the detour. I am marking a line by here "C" that if you use the Jefferson Highway as the levee it will leave a part of the railroad which is now in the district next to the river,
163 exposed to the water wont it?

A. Yes.

Q. What is the per cent of your fee that you get from the district?

A. Five per cent.

Q. You get that when?

A. Well, I am handling that as a part of this work. We have to do the location work and I get five per cent on that. The other part upon which the preliminaries have already gone through, I only get I believe three per cent. That is the original work that was done I have been paid for by the district.

Q. You don't get anything of the remaining fee unless the work is carried through?

A. Unless the work is carried through it depends.

Q. Your fee is contingent?
A. It depends on whether the work is done or not.
Q. How many acres are in that levee district?
A. As I remember it [—] about 12,000 acres.
Q. How did you estimate that?
A. I have the acreage exactly but not with me. The way we did it before we put the plenimeter on our plat and figured out the acreage exactly.
Q. Did you go to Little Rock in order to try to get the legislature to change the boundary lines in 1917?
A. No.
Q. Did you have any conference about it? A. No.
Q. In any conference with Mr. Etheridge and Mr. Beeson and Dr. Henry about that matter?
A. Yes.
Q. Did you write a letter or make a statement to them stating the reasons why it should be changed and lessened?
A. I don't remember whether I did or not, whether I said it in writing or verbal.
Q. Did they consult you and ask your advice on the matter?
A. Yes.
Q. Did you give it to them? A. I did.
164 Q. Did they go to Little Rock to ask that the legislature change the boundary?
A. I don't know.
Q. Mr. Christian, you said in giving your opinion to the effect that the railroad company would be [benefitted] that it would be [benefitted] by a saving of up-keep. Will you explain what you mean by that?
A. By the elimination of water from the dump and by there being an opportunity for at least shortening the bridge.
Q. By the bridge you mean the trestle north of the steel bridge?
A. Yes.
Q. How did you figure that out?
A. Because I know that an earthen dump is much cheaper to maintain than a bridge.
Q. Did you take into consideration that they already had the wooden structure there?
A. Yes, and I also took into consideration the fact that they have to replace them now and then.
Q. Do you know how often they have to replace them?
A. Not since they use creosoted ties and timbers.
Q. Do you know the annual up-keep?
A. No, it would be merely an estimate.

Q. And so you don't know what it is do you?
A. Not exactly.
Q. Do you know what it would cost to fill in the dump?
A. I have an idea.
Q. How much?
A. It would cost about $5,000.00 to fill that dump in.
Q. That would be adding $5,000.00 to the cost to the railroad wouldn't it?
A. Yes.
Q. And you would have to pay the interest on that $5000.-00?
A. But you would be in the cost of replacing the cost of that bridge.
Q. Do you know which is the greater? A. Yes.
Q. Which? A. Replacing the bridge.
Q. But you cant give the figures on it?
A. I know it would cost you from twenty to twenty-five dollars a running foot to replace it.
Q. Can you give the figures on it?
A. No, I have not replaced any in a long time.
165 Q. Then if the company by reason of the situation was not justified in filling the bridge and doing away with the wooden structure, if it were not justified in doing that, then [were] would be no saving would there?
A. No, if they were not justified in doing it.
Q. If good railroading and safe railroading demanded that that be kept open notwithstanding a levee might be west of it, then it would be a loss rather than a saving?
A. I don't see how you figure it.
Q. At least there would be no saving in that? A. No.
Q. You made an estimate of the cost of the improvements under this act of the legislature did you?
A. Yes.
Q. How much was it?
A. Around $70,000.00 as I remember it.
Q. What was it that would cost that?
A. That was the levee and the ditch.
Q. The levee shown on the map that is introduced?
A. Yes.
Q. And where was the ditch?
A. Well, the ditch was to begin here in Section 1 and run right up to—Twp. 11-31, and run to up in section 12.
Q. What was the ditch to cost?
A. I don't remember just what the ditch was to cost. I believe it was based on an estimate of about 12 cents a yard as I remember it.

Q. What was it to cost?
A. I say I don't remember.
Q. What size was it to be?
A. I haven't that record but I believe it was 14 feet bottom.
Q. How deep? A. Averaged about 10 feet.
Q. Same width all the way through?
A. Same width base?
Q. Yes. A. Yes, sir.
Q. What do you figure on the right of way costing you, anything?
A. I don't remember.
Q. Did you figure on the right of way cost as to the levee?
A. We always do in making these levees.
166 Q. Did you in this case?
A. I am pretty sure I did. I never make an estimate without it.
Q. What did you figure the right of way would cost?
A. I don't remember.
Q. Did you make a report to the Board of Directors?
A. I did.
Q. In writing? A. I did.
Q. Have you got it with you? A. No.
Q. Where is it?
A. It is in possession of the Board.
Q. What was the estimate shown in that?
A. I think it was about $70,000.00 as I remember it.

Redirect Examination

By Mr. Head:

Q. If this levee was built as contemplated, would there be any reason why the Railroad Company should not either cut out entirely or at least practically all of the trestle there?
A. I see no reason why they should not.
Q. Now then if there were no benefit at all to the railroad company's track itself by reason of the protection from the levee, state whether in your judgment there would still be a benefit derived by the railroad from increased tonnage on account of this improvement?
A. Well, it would certainly be a benefit from increased tonnage. It is a matter of common knowledge that you cant benefit any territory without [benefitting] everything there is in it, especially in matters of drainage and levees.
Q. Now Mr. Christian, how much above the high water mark on the trestle is the proposed top of the levee immediately west of it?
A. About a foot and a half.

The Court: I didn't understand that.

A. He asked me how much higher the grade line was at this point opposite the trestle, the proposed line of the levee above high water mark on this bridge. It is a foot and a half.

The Court: How high is the bridge above high water mark, the lower stringer, say?

A. Well, I have the base of the rail here—would be
167 3.7 feet below the base of the rail so that you would have below the stringer, there would be a foot and seven tenths. The high water mark is about 1.7 feet below the bottom of the stringer.

The Court: How would that compare with the top of the levee?

A. That would be a foot and a half below the top of the levee.

Mr. McDonough: You mean the top of the rail?

A. No, the high water mark.

Q. You said it would be about 3 feet?

A. No, I believe I told you two feet higher all along there in front of that levee.

Q. The opening would be lower than the top of the rail?

A. Yes.

Q. You were not there in 1915 when that water was up?

A. No, sir: I wasn't.

Q. What I want to get at is was the levee as you have proposed it, and just been talking about, below or above the high water of 1915?

A. It will be above the high water of 1915, because the cross section of that bridge has been taken since 1915 and the high water mark would show on there.

Q. How much would it be?

A. About 18 inches above the high water mark of 1915.

Redirect Examination

By Mr. Head:

Q. You say that 1915 is the highest water you have been able to discover any trace of by investigation, for forty years?

A. Yes.

Q. State whether or not in your experience as an engineer on these levee districts you have figured a safe margin in view of the past experience at that point with the water?

A. Well, as to that question, of course, we have. There is some of those districts though you are unable to figure that kind of levee. We have built levees that we know at some

period the maximum water will over top our levees, but those periods are so far apart that we are justified in going to the expense of protecting land between those high waters. I know Miller Levee District No. 2, we know when we get a
168 repetition of 1908 water it will over-top that levee in some places. That is one water in a life time and to put a levee up that would take care of any water that would ever come would be so expensive that it would not justify us to make that big expenditure.

Q. That isn't what I asked you at all. Assuming that four inches is the highest water that has ever been known, four inches above the 1915 overflow is the highest water ever been known, what in your judgment would the levee as contemplated take care of that?

A. Yes, I believe that levee would take care of it.

Q. Mr. Christian, you may state whether those plans are merely [testative] on the part of the district as to the heighth of the levee, or whether they have been fixed?

A. It is merely a tentative plan subject to revision at any time.

Q. If you find that you haven't your levee high enough at any point it may be raised or strengthened?

A. Yes.

Q. Mr. McDonough seemed to think something about the detour line being left out. In the event any part of the detour line is cut out by the terms of the act then that goes out of the district?

A. Goes out of the district and the tax refunded as I understand.

Cross-Examination

By Mr. McDonough:

Q. That is the reason you didn't leave the whole of the railroad out, wasn't it?

A. No, you are wrong about that.

Q. Didn't consider that at all? A. No, sir.

Q. You said something about if you should build the line on this last exhibit as shown down to section 2 and 14, down to the railroad that it would have a certain effect upon the water. I would like to understand what you said about that. You spoke of building a line east of the railroad, east of the right of way. Now what effect would that have on the water that would come in there? That would let the water go through the open trestle of the railroad, of course. Then what becomes of it?

169 A. It would have to run down parallel between the railroad and the levee to get into the river.

Q. Now what effect would that have upon the levee?

A. Well, I don't know that it would have any.

Q. How much water would go down through there?

A. Well, that would depend altogether on the stage of the water.

Q. And also the opening too, wouldn't it?

A. No, the governing feature there would be the high ground at the river bank.

Q. It wouldn't run up hill?

A. Well, yes, the sum and substance of it.

Q. Do you mean to say that the water would not run down that way as fast as the water ran in the river? Wouldn't it run the same rate down the railroad bank and embankment that it runs in the river?

A. Nothing like it.

Q. Then it would check up at the place where it comes under the trestle would it?

A. Well, to a slight extent.

Q. Would you dam it up there if the way was open?

A. It would raise sufficient to give it sufficient head to carry the water down.

Q. You never ran the levels to see whether that was down grade or up grade?

A. Yes, we have some levels. The levels were taken just outside of the right of way.

Q. What did you take them for?

A. To determine as near as possible the heighth of the railroad dump.

Q. What were you figuring on the dump for, going to use it as a levee?

A. No, sir; had no idea of it.

Q. Why was it necessary to go over there in order to take the heighth of the dump?

A. It was the natural ground where no dirt had been removed and would give a clear idea of the heighth of the dump.

Q. The dirt had not been removed?

A. There was a bar pit on either side. On the side next to the river the ground is very much higher.

170 Q. Did you lay any levels in order to determine whether section 14 is lower or higher than the surface of section 11?

A. No.

Q. You don't know which way water would run between those two?

A. I had no levels on it. I know which way it does run.

Q. It runs towards 11, does it? A. Yes, sir.
Q. How much is the fall, do you know?
A. No, I don't know what the fall is.

Mr. M. W. Milwee, being recalled on behalf of defendants, testified as follows:

Q. Mr. Milwee, you were living at Horatio at the time of the 1915 flood?
A. Yes, sir.
Q. In August of that year?
A. Yes, been living there ever since it was a town.
Q. From the time that the water went out of the bank of Little River until it got back in the bank, what length of time was that?
A. I don't know for certain. I think about 3 days or something like that.

Mr. Head: I want to introduce the certificate of the Tax Commissioner showing the valuation of the railroad track and side track in this district?

The Court: It will be introduced as exhibit 3.

C. E. Johnston, being recalled by the plaintiffs, testified as follows:

Direct Examination.

Q. I wish you would state in your own was the difference in cost and maintenance, if any, in the use of the trestle, or in filling the space occupied by the trestle with dirt
171 or other proper material, giving the figures and amounts?
A. I take it you refer to this trestle in question.
Q. Yes.
A. So far as we can we estimate those things along these lines. We take the cost of the trestle and the cost to renew it; take into consideration the life and the cost each year to carry it. How much would be the average cost per year to maintain it and compare that with the cost of filling and the interest on the additional investment on account of the filling and the cost to seasoning the new fill when it is put in. In this case that trestle cost on our books $3700.00. We estimate the life of it as 9 years. It is an untreated trestle. One-ninth of $3700.00 is approximately $415.00. That would be the annual cost to maintain that trestle. That is the average annual cost of it to renew it, so at the end of 9 years we have a new trestle.

To fill that hole would cost at fifty cents a yard, if necessary to do it by train, would cost $4600.00. It will require 9200 yards to fill it. Six per cent on $4600.00 is $276.00. That would be our annual interest charge, or a difference of $139.00 between the cost of maintaining the trestle per year, and the interest on the additional investment per year. For the first ten years that new bank is settling and we have to continually raise the track and fully sod and protect it until it gets seasoned so that for the first ten years the difference would be more than [absorved]. The $139.00 would be a small item of cost to maintain that new bank for ten years. After that time the seasoning has taken place and you begin to derive the benefit of the $139.00. That said proposition is applied to the treatment of this kind of cases of a railroad renewing trestles and filling them and getting away from the wooden structures.

Cross-Examination.

[—]

Q. You are figuring there to fill in there at 50 cents a yard at the present prices of labor? A. No, sir.

172 Q. Do you mean to say that that dirt can be moved and put in there and that hole filled up for fifty cents a yard? A. I don't think it could.

Q. How much did you say it would cost?

A. We are moving dirt now with ditching machines and shovels that is costing us around 80 cents a yard.

Q. That would be $7,000.00? A. Approximately.

Q. At present prices of labor and material what would it cost you to put in that bridge there?

A. We don't have to put it in now.

Q. At present prices of labor and material what would it cost to put that bridge in now?

A. About $15.00 a foot. That is 510 feet. About $7609.00.

Q. Now then whenever you do have to renew that bridge you are going to have to pay six per cent on that renewal?

A. No, sir.

Q. Why? A. Because we have the investment made.

Q. But the investment is lost by reason of the piles going out entirely?

A. No, no, we don't mark off the investment at all. It goes into the operating expenses and maintenance.

Q. Then at the expiration of nine years you would have to renew that bridge?

A. That bridge was renewed yes, every 9 years we get the life of it.

Q. Now you didn't figure in that your interest on the investment on the $3700.00? A. No, we we have that made.

Q. It cost you money to put it there?

A. That is true, but we have that investment. The idea now is to throw that away.

Q. If you figured that cost you would have about $220.00 a year interest on it?

A. We would if we included it. But it is not proper to include it as a comparison.

Q. Then you would have the additional element of safety in the dump as against the trestle wouldn't you?

A. It isn't there at that place. I would rather have
173 the trestle in this case.

Q. If there was a levee built sufficient to hold the water off the dump?

A. If there was a levee there sufficient to hold the water, assuming that is the case, it would be better to have the fill.

The Court: As an engineer do you regard it as good railroad engineering to have the trestle there rather than a dump even if you were assured that you would have a levee high enough to protect against the usual overflows?

A. I would say no, if I know just what was mean by the usual overflows. It is always the unusual overflows that tear us to pieces. It is just a matter of judgment as to whether or not it would be the proper thing to take a chance on it.

The Court: Probably I did not phrase the question right. In what way would your judgment be exercised under the circumstances regarding it from a railroad engineering standpoint?

A. From a railroad engineering standpoint that judgment would be in favor of the safe side. In other words, if it was felt from past performances of the stream that there was any chance for the levee construction to fail, particularly in that kind of place, and so long as we have a trestle we will use it; we will carry that because the difference between that and the bank is comparatively small and we will wait and see what effect the levee will have. Until it has been fully demonstrated that we are safe, then we would consider filling the trestle.

Mr. Head: Isn't it a fact that if you got water there such as you did in 1915, or anything in excess of it, that you will have a washout there at that point?

A. I would say yes. I think 1915 was as close as we want to see that water and not wash out.

Mr. Head: I here offer and introduce in evidence a certificate from the Arkansas Tax Commission showing the
174 assessment of the railroad property in the Little River Drainage and Levee District of Sevier County No. 1, which said certificate is in words and figures as follows, to-wit:

(Certificate of the Arkansas Tax Commission showing the Assessment of the property of the Texarkana and Fort Smith (Branch of the Kansas City Southern), Railway Company in the Little River Drainage and Levee District of Sevier County, No. 1 Arkansas.)

I, A. A. Poff, Secretary of Arkansas Tax Commission, do hereby certify that this is true and perfect copy of the Certificate of Assessment against the Railroad and for the County as herein set-out.

In Testimony Whereof, I have hereunto set my hand on this 28th day of June 1918.

A. A. POFF, Secretary.

Value of "Railroad Track", "Rolling Stock" and Buildings" and "Materials and "Stores" belonging to or operated by the Texarkana & Ft Smith (Branch of K. C. Southern) Railway Company on the first Monday in June, 1917, located in the County of Sevier State of Arkansas, and in the Cities and Incorporated Towns in said County as fixed by the Arkansas Tax Commission for the year 1917.

Rolling stock and material and stores assessed as personal property

Main Track Per Mile $27000		Side Track Per Mile $3000		Rolling Stock Per Mile $3000		Valuation of Materials and	
Miles	Valuation	Miles	Valuation	Valuation	Buildings Valuation	Stores of every kind	Total Valuation in County
25.31	683370	17.47	52410	75930	55825	3544	871079

Note—The amounts rendered below are not to be added to amounts rendered above. Rolling Stock and material and stores assessed as personal property.

No. or Name of School District	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials and Stores of every kind.	Total Valuation in School District
48 Mineral	100	27000	10	300	3000	730	200	31230
47 Gillham	203	54810	74	2220	6090	3495	225	66840
70	403	108810	12	360	12090			121260
56	211	56990	42	1260	6330			64560
12	50	13500	55	1650	1500			16650
57	205	55350			6150			61500
17 DeQueen	378	102060	975	29250	11340	46605	2869	192124
10	225	60750			6750			67500
53	206	55620	243	7290	6180			69090
55 Horatio	550	148500	336	10080	16500	4995	250	180325
Total	25.31	683370	17.47	52410	75930	55825	3544	871079

177 Cities and Incorporated Towns

Note—The amounts rendered below are not to be added to amounts rendered above. Rolling stock and material and stores assessed as personal property.

Town or City	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials and Stores of every kind	Total Valuation in City or Town
Gillham	81	21870	74	2220	2430	3495	225	29240
DeQueen	152	41040	923	27690	4560	46605	2869	122764
Horatio	144	38880	198	5940	4320	4995	250	54385

Office of Arkansas Tax Commission
Little Rock, Arkansas

I, A. A. Poff, Secretary of the Arkansas Tax Commission, do hereby certify that the above is a true and perfect statement of the value of all property belonging to or operated by Texarkana & Ft. Smith (Branch) K.C.So. Railway Company on the first Monday in June, 1917, located in the County of..... State of Arkansas, and in School Districts, Cities and Incorporated Towns in said County, and to be taxed therein for the year 1917, as found by the Arkansas Tax Commission.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Arkansas Tax Commission, at Little Rock, this 2nd day of August 1917.

(Seal)

A. A. POFF
Secretary of Arkansas Tax Commission.

178 I, A. A. Poff, Secretary of the Arkansas Tax Commission do certify that this is a true and perfect copy of the Certificate of Assessment against the Railroad and for the County as herein set out.

In Testimony Whereof, I have hereunto set my hand this 28th day of August 1918.

A. A. POFF, Secretary.

Value of "Railroad Track", "Rolling Stock" and Buildings" and "Materials and "Stores" belonging to or operated by the Texarkana & Ft. Smith (Branch K.C.S.) Railway Company on the first Monday in June, 1917, located in the County of Sevier State of Arkansas, and in the Cities and Incorporated Towns in said County as fixed by the Arkansas Tax Commission for the year 1917.

Rolling stock and material and stores assessed as personal property.

Main Track Per Mile $17000		Side Track Per Mile $3000		Rolling Stock Per Mile $ No R.S. Valuation	Buildings Valuation	Valuation of Materials and Stores of every kind	Total Valuation in County
Miles	Valuation	Miles	Valuation				
845	143650				1230		144880

179 "Neal Springs Branch"

School Districts

Note—The amounts rendered below are not to be added to amounts rendered above. Rolling stock and material and stores assessed as personal property.

No. or Name of School District	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials and Stores of every kind	Total Valuation in School District
10	.80	13600						13600
53	2.00	34000						34000
55	3.41	57970						57970
Neal Spgs. 65	2.24	38080					1230	39310
	8.45	143650					1230	144880

Note—The amounts rendered below are not to be added to amounts rendered above. Rolling stock and material and stores assessed as personal property.

Town or City	Main Track	Valuation	Side Track	Valuation	Rolling Stock	Buildings	Valuation of Materials and Stores of every kind	Total Valuation in City or Town
None								

Office of Arkansas Tax Commission
Little Rock, Arkansas

I, A. A. Poff, Secretary of the Arkansas Tax Commission, do hereby certify that the above is a true and perfect statement of the value of all property belonging to or operated by Texarkana & Ft Smith (Branch) Railway Company on the first Monday in June, 1917, located in the County of Sevier State of Arkansas, and in School Districts, Cities and Incorporated Towns in said County, and to be taxed therein for the year 1917, as found by the Arkansas Tax Commission.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Arkansas Tax Commission, at Little Rock, this 6th day of August, 1917.

A. A. POFF
Secretary of Arkansas Tax Commission.

(Seal)

181 W. W. MILWEE, being recalled by Plaintiffs, testified as follows:

Direct Examination.

Q. Did you go with Mr. Herman in running out the line that is shown on the map here?

A. In making that levee survey?

Q. Yes. A. Yes, sir.

Q. I wish you would state what instructions you had with reference to the location of the high water mark—

Mr. Head: I object to that as incompetent, irrelevant and immaterial.

The Court: What is the object of that Mr. McDonough?

Mr. McDonough: It is to show that they ran the line which is testified to at the high water mark.

The Court: It seems to me that it is the same testimony as given by Mr. Christian.

Mr. McDonough: What I propose to prove here by Mr. Milwee is that he was instructed by the board or by the engineer with Mr. Herman to go and run that line at the high water mark and that they did run it accordingly.

The Court: It seems to me that is in exact accord with the testimony already in.

Objection overruled.

Mr. Head: Save an exception.

A. I had no instructions at all but I was with the party.

Q. I just want to ask you the question if that was the instruction to locate that line?

A. It is my understanding we was to.

Mr. Head: I object to his understanding and move to strike it out.

The Court: It will be stricken out.

Q. Was that your instruction in connection with Mr. Herman?

A. That was my understanding about it. Just to get the number of acres.

Mr. Head: I am trying to get at a motion to strike
182 out his understanding.

The Court: It has been stricken out.

Q. To refresh your memory, didn't you state to me just a moment ago that your and Mr. Herman's instructions were to run that line at the high water mark?

A. Mr. Herman's instructions and I said we did run it right around the foot hills at the high water mark.

The foregoing statement of evidence consisting of 153-1/8 pages contains the whole of the testimony given in this cause, together with the rulings of the court thereon.

Stipulation for Approval of Statement of Evidence.

It is stipulated and agreed by and between the parties to this cause, through their respective solicitors, that the foregoing statement of evidence may be approved by the court, or the Judge thereof, as the statement of evidence to be used for the purpose of defendants' appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States", and the complainants, Kansas City
183 Southern Railway Company and Texarkana & Fort Smith Railway Company, do hereby expressly waive their right to have the statement of evidence first lodged in the clerk's office for their examination and waive their right to the ten days' notice of the time and place where the defendant will ask the court, or Judge thereof, to approve the same as provided by said Rule 75.

JAMES B. McDONOUGH
Solicitor for Complainants.

JAMES D. HEAD,
Solicitor for Defendants.

Approval of Statement of Evidence by the District Judge.

Upon agreement of all parties, the foregoing statement of evidence is submitted to and approved by me on this 25th day of August, 1919, as the statement of evidence to be used for the purpose of appeal to the Circuit Court of Appeals of the United States for the Eighth Circuit, under Rule 75 of the

"Rules of Practice for the Courts of Equity of the United States", from the decree herein.

FRANK A. YOUMANS
United States District Judge.

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184 Precipe for Transcript.

Filed in U. S. District Court August 25, 1919.

To William S. Wellshear, Clerk of said Court:

Please prepare and duly authenticate for the appeal of the defendants, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County, No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, to the United States Circuit Court of Appeals for the Eighth Circuit from the decree in the above entitled cause entered the 13 day of May, 1919, a transcript, incorporating the following portions therein and no other, to-wit:

1. Original bill of complaint.

2. Amendment to the Original bill of complaint.

3. Joint answer to the complaint as amended.

4. The order of the court of April 1, 1918, granting a temporary injunction.

5. The order of the court of November 11, 1918, granting leave to amend answer.

6. The trial order of the court under date of November 15, 1918, showing the hearing of the testimony and the submission of the cause.

7. The final decree of the court with findings of facts and declarations of law, dated May 13, 1919.

8. The opinion of the court filed in this cause.

9. The statement of evidence finally approved by the
185 court or the Judge thereof.

10. The Petition of Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, for their appeal.

11. The Assignment of Errors for such appeal by the above named defendants.

12. The order of the court or the Judge thereof allowing such appeal.

13. The bond of the above named defendants upon appeal.

14. The citation issued on such appeal showing the service thereof.

15. Notice of election of these defendants regarding the printing of record.

16. Defendants' precipe for transcript on appeal.

Dated at Texarkana, Arkansas, this the .... day of August, 1919.

JAMES D. HEAD.
Solicitor for Defendants, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors.

Due service of a copy of the foregoing precipe at Texarkana, Arkansas, this the 21 day of August, 1919, upon the plaintiffs and appellees, Kansas City Southern and Texarkana & Fort Smith Railway Companies, is hereby acknowledged and further service waived.

JAMES B. McDONOUGH
Solicitor for Plaintiffs, Kansas City Southern Railway Company Texarkana & Ft. Smith Railway Company.

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186 (Election as to Printing.)

(Filed in the U. S. District Court August 25, 1919.)

Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors of said Drainage and Levee District, being the appellants in the above entitled cause from the decree of the District Court of the United States for the Western District of Arkansas, Texarkana Division, to the Circuit Court of Appeals of the United States for the Eighth Circuit, hereby give notice that they elect to take and file in said appellate court, to be printed under the supervision of its clerk under its rules, a transcript of such portions of the record as may be fully settled under Rule 75 of

the "Rules of Practice for the Courts of Equity of the United States", duly authenticated.

JAMES D. HEAD
Solicitor for Defendants, Will F. Thomas, Sheriff and Collector, Little River, Drainage and Levee District, et al.

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187 Memorandum Opinion.

Filed in U. S. District Court April 23, 1919.

This is a suit by complainants to enjoin the collection of certain assessments made against the Railway Company property under the provisions of the Act of the Legislature of Arkansas creating the Little River Levee and Drainage District No. 1 of Sevier County, Arkansas.

I.

The first contention upon the part of complainants is that the Act creating the District does not properly define the boundaries of the District and is therefore void. The boundaries are defined in Act 79 of the Acts of 1917 at page 348 as follows:

"Begin where the north and south line passing through the middle of section three (3), township ten (10) south, range thirty-two (32) west, intersects the south bank of Little River; thence south to the north bank of said river; thence east and south along the bank of said river to where it intersects the line between sections ten (10) and eleven (11), township eleven (11) south, range thirty-one (31) west, thence north to the line of the hills, which is entirely above overflow; thence northwesterly following said line of hills, to the north line of section two (2), township ten (10) south, range thirty-two
188 (32) west; thence west to the Little River; thence south, west and northwest along the line of said river to the point of beginning; be and the same is hereby formed into a drainage and levee district, to be known and designated as the Little River Drainage and Levee District of Sevier County Number one."

Complainants contend that the portion of the description "thence north to the line of the hills which is entirely above overflow; thence northwesterly following said line of said hills to the north line of Section 2" makes it impossible to determine the limits of the district.

A similar objection was made in the case of Dorsey Land and Lumber Co. vs. Board of Directors of Garland Levee District, 203 Southwestern, 33. In the opinion in that case the Supreme [—] of Arkansas said;

"We are of the opinion, therefore, that the descriptive words are not so uncertain as to render the statute void. Nor can it be said that the other descriptive words with reference to the "line at the foot of the hills where the high land and overflow lands, or bottoms, join", is too uncertain description to be valid. The evidence of engineers and surveyors is to the effect that the line between the bottom lands and the uplands is sloping and rather uncertain, but it is not impossible to approximately follow the line. The worst that can be said about the line with respect to its uncertainty, to accept the statement of one of the engineers, is that lines run by different engineers according to the description given might vary as much as 100 feet. It is not essential that a line of that kind should be shown with absolute accuracy. Only reasonable approximation is required, for the purpose of the lawmakers was to point out a line between the lands that
189 would probably be benefited by the construction of the levee and those that would receive no benefit. Such a line as that would necessarily be to some extent an approximation and not an absolutely definite and accurate line. The attacks upon the validity of the statute on account of alleged indefiniteness are therefore unfounded."

The description in the instant case does not appear to be any more indefinite than the description in the case involved in the opinion quoted above.

II.

The next contention on the part of the complainants is that the act of the legislature does not assess the benefits to the various properties in the district. The basis for making the assessment is the assessed valuations of the property. The act gives the directors the authority to make an annual assessment not greater than six per cent. of the assessed valuation. The only discretion given to the directors is with regard to the percentage to be levied each year. The basis is fixed by the valuations put upon the property by the officers having authority to perform that duty. There seems to be no merit to this contention.

III.

It appears a district of the same name and including the same property was created under an Act of the Legislature of 1915. The Act of 1917 leaves out of the district a considerable portion of the land incorporated in the district created by the act of 1915. Complainants contend that the Act of 1917 is illegal because it requires the district created by the Act of 1917 to pay the debts of the district created by the Act of 1915. The later act is amendatory to the prior one.

The legislature doubtless had good reasons for leaving
190 out certain of the territory. There is no allegation of fraud with regard to the change and it must be concluded that the Legislature had good and sufficient reasons for making the change.

IV.

Complainants next contend that the railroad property receives no benefit from the contemplated improvement. Engineers testified that the embankment which would be thrown up to protect lands from overflow would not in any way benefit the property of the railroad. Witnesses on behalf of the district testified that if the embankment is constructed as contemplated a certain trestle [conected] with the bridge across Little River could be discarded and an embankment put in its place. Testimony was introduced on behalf of the Railroad Company to the effect that it would not be good railroad engineering to discard the trestle and that in view of the fact that the trestle is already there and serving the purpose for which it was put there, the substitution of an embankment would not be a saving of expense, but on the other hand would require an additional outlay.

On behalf of the District testimony was introduced to the effect that by reason of the drainage of the lands within the District the area of farm lands that could be utilized would be increased and that the railroad company would therefore receive for transportation a much greater tonnage. It is argued on behalf of the railroad company that increased tonnage arising from bringing into cultivation additional lands is a general benefit which will not justify [as] assessment. In the case of the St. Louis San-francisco Railroad Company vs. Bridge

District, 113 Arkansas 496, the property of the railroad
191 company was assessed for the purpose of constructing a free bridge across the Arkansas River at Van Buren. It was contended upon the part of the railroad company that its property would receive no benefit from the construction of

such bridge. Testimony was introduced tending to show that the bridge by reason of the fact that it was used by the street car company for the purpose of transporting passengers between Fort Smith and Van Buren, reduced the traffic on the Railroad Company's line. In its opinion the Supreme Court of Arkansas said:

"It is contended on the part of each of the appellants that the showing made as to loss of earnings of railroad companies during the short period since the bridge was completed and put into operation is conclusive evidence of the fact that no benefits will accrue to the property of the companies on account of the improvement. It is shown that the earnings from passenger traffic have decreased on account of the fact that the interurban trolley line between Fort Smith and Van Buren has created competition in that traffic, which will in the future, as it has done in the past, prove a detriment, instead of a benefit, to the railway companies.

"That does not necessarily follow, for the estimated growth of population in the locality may reasonably be expected to increase the traffic, even with the additional competition.

"The decrease of earnings in freight traffic is accounted for in the testimony of witnesses by showing poor crops during the year since the bridge was put into operation."

It thus appears that the Supreme Court of Arkansas is committed to the doctrine that increased traffic may be
192 taken into consideration as a benefit to a railroad company. There are authorities to the contrary.

In the case of Cache River Drainage District vs. Chicago & E. I. R. Co., 99 Northwestern Reporter, page 635, the Supreme Court of Illinois said:

"In the examination of W. N. Moyers, a witness for the appellee, after having testified as to the condition of the appellant's track, its height above water, the effect of reducing the flood level, and many things in regard to the merits of the case, he was asked what other benefits there could be, and over objection was permitted to answer: "Sanitary, esthetic and commercial". On cross-examination he testified that there would be no sanitary benefit to the right of way, as a right of way, for railroad purposes; that the drainage would increase the agricultural output of that section of the country and the number of inhabitants that will ride on the

railroad perhaps. The appellants then moved the court to strike out and exclude from the jury the evidence of the witness as to sanitary, esthetic and commercial benefits. Afterward the appellant asked the court to give to the jury the following instruction, which was refused:

"You are instructed that in assessing benefits against said railroad company in this proceeding you have a right to consider only such benefits as will result to the company's right of way in said district for railroad benefits. Benefits to the corporation itself, as a transportation company, growing out of a possible increased productiveness of agricultural land within said district as a result of said improvement, which may lead to an increase of freight and passenger traf-
193 fic to said company, is not a Proper element of the benefit to be considered by the jury in a case of this kind."

"In the cross-examination of a witness for the appellant this question was permitted to be asked of him, over objection: "Isn't a drainage proposition, or a scheme that drains a district through which a railroad traverses of an immeasurable benefit to a railroad, regardless of the fact as to whether it hurts or destroys the track or rail? He answered, "That depends on the location."

"In these rulings on the evidence and in refusing this instruction the court committed error. The indirect, uncertain, and speculative benefit which may be derived from the increase of agricultural production and passenger traffic is not an element to be considered in assessing benefits to be derived from drainage. It is the direct benefit to the railroad as property, and not to the company in its business, which is to be considered. Whatever tends to decrease the expense of maintenance of the track and railroad or the operation of trains is a legitimate subject for consideration, but not the possible increase of business arising from the general increase in productiveness and prosperity of the country and the community. The answer to the last question, alone, might have done no harm, but even that answer implies that under certain circumstances the drainage of a district was an immense advantage to a railroad without regard to its effect on the track. This evidence, as well as that of the other witness, was permitted to remain in the record, and the jury could reasonably have supposed nothing else than that it was legitimately before them for their consideration. The court refused to tell them that they should not consider it".

The testimony in the instant case warrants the conclu-
194 sion that the railroad company will receive no benefit from the improvement contemplated except such benefit as arises from increased traffic. In view, however, of the decision of the Supreme Court of Arkansas above quoted, such a benefit must be held in this State to be sufficient to warrant an assessment.

V.

The complainants further contend and set up in their answer that by reason of the assessments imposed under the act in question the railroad company is deprived of its property without due process of law and is not accorded the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. Upon this point this court is controlled by the case of Bush vs. Branson, 248 Federal, 377, decided by the Circuit Court of Appeals for the Eighth Circuit. In that case it was held that for the reason that franchise value was made an element in assessing the value of railroad track mileage a greater percentage of assessment was imposed upon the railroad property than upon other real estate in the improvement district.

Therefore, upon the authority of the Bush-Branson case, the contention of complainants must be sustained in that "the act imposes a higher rate of taxation on the railroad property of the plaintiff than it does on the other property in the district by reason of the fact that its franchise and other intangible property are included in its assessment," thus denying to the railroad company the equal protection of the laws required by the Fourteenth Amendment to the Constitution of the United States.

The temporary restraining order heretofore granted will therefore be made permanent and proper order may be submitted for that purpose.

FRANK A YOUMANS, Judge.

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195 (Clerk's Certificate to Transcript.)

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages hereto annexed numbered 1 to 194 inclusive, contain and constitute a true and correct copy of the record, assignment of errors, and all proceedings, in the case of Kansas City Southern Railway Company, et al, vs. Will F. Thomas, Sheriff and Collector, Little River Drainage and

Levee District of Sevier County No. 1, et al, No. 33 in Equity, in accordance with the precipe of counsel therein set forth, as the same appear on file and of record in my said office in the Texarkana Division of said District.

This transcript is in return of the appeal of Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, to the United States Circuit Court of Appeals for the Eighth Circuit.

Citation with acceptance of service is annexed and returned herewith.

Seal
U. S. Dist. Court,
West. Dist. of Ark.

In Testimony Whereof, I hereunto set my hand and affix the seal of said court at office this September 15, 1919.

WM. S. WELLSEAR, Clerk.

Filed Sep. 16, 1919. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellants.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 5489.

WILL F. THOMAS, Sheriff, etc., et al., Appellants,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY et al.

The Clerk will enter my appearance as Counsel for the Appellants.
JAMES D. HEAD.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 18, 1919.

(*Appearance of Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.
JAMES B. McDONOUGH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 13, 1920.

(*Order of Submission.*)

December Term, 1920.

Monday, December 6, 1920.

This cause having been called for hearing in its regular order, the same was argued by Mr. James D. Head for appellants and submitted on brief by appellees.

Thereupon, this cause was submitted to the Court on the transcript of the record from said district Court and the briefs of counsel filed herein.

(*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1921.

No. 5489.

WILL F. THOMAS, Sheriff and Collector, etc., et al., Appellants,

vs.

KANSAS CITY SOUTHERN RAILWAY CO. et al., Appellees.

Appeal from the District Court of the United States for the Western District of Arkansas.

Mr. James D. Head for appellants.
Mr. James B. McDonough submitted brief for appellees.

Before Sanborn and Stone, Circuit Judges, and Trieber, District Judge.

STONE, *Circuit Judge*, delivered the opinion of the Court.

This is a complaint by the Kansas City Southern Railway Company and the Texarkana and Fort Smith Railway Company against Little River Drainage and Levee District No. 1 (of Sevier County, Arkansas), Will F. Thomas (sheriff and collector of Sevier County), E. W. Beeson, G. A. Henry and Frank Ethridge, (directors of the above district). The purpose of the action is to enjoin the collection of certain assessments made against the property of the railway companies located within the district. The assessments were for drainage and levee purposes of the district. The district was created by an Act of the Legislature of Arkansas. Upon final hearing a permanent injunction was decreed from which the defendants appeal.

The court found all issues and contentions adverse to complainants except one and partially as to another. The court held as to the first one, that a higher rate of taxation was imposed upon the railways than upon other property owners by reason of the fact that while other owners were taxed upon the basis of the assessed value of land lying within the district, the railways were taxed, in addition upon the value of their franchises and other intangibles. In reaching this conclusion the court felt bound by the decision of this court in Bush v. Branson, 248 Fed. 377. As to the other, the court held that there were no direct benefits to the property of the railways except such as might arise from increase of traffic through increased production upon the lands protected by the district. Appellants contest these two conclusions, contending that the franchise value is not taxed and that there were other and direct benefits to the railways. The court correctly construed and applied the above decision of this court in the Bush case but since the decree in the

case the Supreme Court has reversed this court in the Bush case (251 U. S. 182) on this point. Therefore, the ground upon which the court based its decree is insufficient.

Appellees contend, however, that there were other sufficient grounds for the injunction decree and that this court is not bound by the findings of the trial court adverse to them but should anew examine those grounds and, if any are found to be sufficient, should uphold the decree. They contend (*a*) that the district is illegal and void because of being uncertain and indefinite in the definition of its boundaries; (*b*) that the district is void and the assessments illegal because there are no directors therefor designated by the Act of 1917; (*c*) that both the Acts of 1915 and 1917 forming the district are invalid because no notice nor opportunity for hearing was afforded the owners of land included therein; (*d*) that the land of appellees is in no manner benefitted; (*e*) that the assessments are wholly arbitrary, unjust, illegal and void; (*f*) that, as to appellees, the above two Acts are an arbitrary abuse of the taxing power, amounting to confiscation of appellees' property; (*g*) that the assessments were made without notice to appellees. Of the above contentions, three (*b*, *c* and *g*) are not within the issues made by the pleadings and, therefore, cannot be considered.

The contention that the boundary line of the district is uncertain and indefinite refers only to the northern line of the district. The legislative Act of 1915 fixed this line from the northeast corner of the district as "west to the line where the lands subject to overflow join the hills or highlands." Appellees expressly admit that this would have established "a definite and fixed line" which "could easily be laid out." The amendatory Act of 1917, however, continued the northern part of the east line of the district and defined that portion of the boundary and the northern line as "thence north to the line of the hills, which is entirely above overflow; thence northwesterly following said line of said hills to the north line of Section 2, Township 10 South, Range 32 West; thence west to Little River." The claim of appellees is that the description "north to the line of hills" designated no point because there was no line of hills; and that the further description requiring the north line to "follow said line of said hills" designated no line at all or any basis for determining any line because the "line of said hills" might mean any of several things, including the foot of the hills on either side or the crest of the hills. The evidence abundantly establishes, and appellees' counsel admit, that there was a rise in ground northerly or northeasterly. This would sufficiently identify what the legislature mean by "hills." The point designated as the northeastern corner of the district as the point where the eastern line extended north would reach the hills where they were "entirely above overflow" was ascertainable from this description and was therefore sufficiently definite. As to that part of the description defining the course of the northerly line, the requirement is that it should follow "said line of said hills." The "said line" is "the line of the hills, which is entirely above overflow." There is no doubt that this meant the overflow line along the southern slope of the hills. The purpose

of the Act was to protect lands subject to overflow and to place the burden of that protection upon the lands so benefitted, and no interpretation of the language used is justified, nor can any reasonable doubt be entertained, which would place the line at the overflow line on the other side of the hills. Appellees argue that the uncertainty of the description is established by the facts that this line of hills is broken in several places by streams and that the engineers in laying this northerly line of the district did not follow these breaks northerly along the overflow line but struck directly across these small valleys. This action of the engineers might be pertinent to the inquiry as to whether they had properly followed or laid down the line described in the Act but it is no evidence of any uncertainty in the description in the Act. We think the description sufficiently definite.

The contention that appellees' land was not benefitted is of more substance. The court found that there were no direct benefits by way of protecting the rights of way of appellees from overflow by flood waters but found that there would be resulting traffic benefits through haul of the increased croppage on the lands within the district because of overflow protection. It also determined that such traffic benefit was sufficient to authorize assessment, citing St. Louis & San Francisco Railroad Co. v. Bridge District, 113 Ark. 48. The Supreme Court of the United States has expressly decided this traffic benefit as one to be taken in account when it said in the case of Bush v. Branson, 251 U. S. 182, "To this must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be a benefit to it, and that no agency for such development equals that of good roads." The evidence is that at present only about ten per cent of the acreage within the district is tilled or tillable because of water but that the wild land is rich and would be cultivated if protected from overflow and that appellees were the only railroads serving this locality. There is the further consideration, upheld in the Bush case, 251 U. S. 182, at 190, that the legislature, by inclusion of appellees' property within the district, has declared that it is benefitted. Under the Bush opinion in the Supreme Court this would tend to establish the existence of traffic benefits such as would justify assessment for district purposes.

There remains the contention that the assessment of benefits made is arbitrary, unjust, illegal and void. This is based on the claim that the basis of assessment is such as to result in the property of appellees bearing more than one-half of the burden of the improvements while such property is in no wise benefitted thereby. In view of what has been said above, it is clear that appellees are benefitted but this does not preclude them from claiming that the amount, or relative proportion, of assessment made is void. While the legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such "Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately

rrect general results" (Kansas City Southern Ry. Co. v. Road Improvement Dist., decided by the Supreme Court of the United States, ne 6, 1921). Such assessment cannot stand if it is "palpably bitrary" or if it is palpably discriminatory (Kansas City Southern y. Co. v. Road Improvement Dist., supra; Houck v. Little River rainage Dist., 239 U. S. 254, 262; Gast Realty Co. v. Schneider ranite Co., 240 U. S. 55). Therefore, the test of law to be applied the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory.

The basis of valuation here employed for benefits is the valuation f all property within the district for general taxation. General axation and assessment for special benefits are essentially different their basic characteristics and their legal theories. One is ounded upon the idea that all property should bear a proportion, ased upon value, of the burden of general taxation; the other, is ounded upon the idea that property actually benefited by a public mprovement should respond in proportion to the benefit so received. bviously, any connection between the value of a given piece of roperty for general taxation and its value for benefit assessment axation is purely accidental. Therefore, the circumstance that he legislature here took them to be identical carries no more force han if some other basis of value had been selected. Examining the vidence, the result is as follows: The district is purely rural. It omprises (as amended by the Act of 1917) approximately twelve housand acres. About ten per centum of this acreage is now cultivated, the balance being rich wild land untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from eight to forty dollars per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle and is above overflow. The only benefit to appellees from this improvement would be through increased traffic because of any increased shipments resulting from greater cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000.00 to $75,000.00. The property of appellees would pay about half of this cost.

The showing thus made reveals this result, to-wit, that the cost of an expensive improvement which will increase the value of about twelve thousand acres of land at least a quarter of a million dollars is to be half paid by appellees which have within a rural locality 3.61 miles of track and which are benefited by a problematical increase of traffic through the greater production from the above benefitted acreage. The following statement in the opinion in Kansas City Southern Ry. Co. v. Road Improvement Dist., supra,

seems directly applicable to these facts: "It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvement upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all."

The facts of this case clearly reveal an instance of a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law," such as is condemned in the cases cited above.

The decree must be and is affirmed.

Filed December 13, 1921.

(*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1921.

No. 5489.

Tuesday, December 13, 1921.

WILL F. THOMAS, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1; E. W. Beeson, G. A. Henry, and Frank Ethridge, Directors, Apellants,

vs.

KANSAS CITY SOUTHERN RAILWAY COMPANY and TEXARKANA AND FORT SMITH RAILWAY COMPANY,

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company have and recover against Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, the sum of twenty dollars for their costs herein and have execution therefor.

December 13, 1921.

(Petition for Appeal to Supreme Court, U. S., Allowance, and Assignment of Errors.)

Petition and Prayer for Appeal.

Now come the above named Will F. Thomas, as Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors of said Drainage and Levee District, and respectfully submit and show that a judgment was rendered on the 13th day of December, 1921 in the above entitled cause by the above court, affirming the decree of the District Court of the United States for the Texarkana Division of the Western District of Arkansas; that the matter in dispute in this case exceeds in value the sum of One Thousand ($1,000) Dollars, besides the costs and exclusive thereof, and that the cause is one involving the question whether a statute of the State of Arkansas is in conflict with the Constitution of the United States, and, therefore, is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

The said Will F. Thomas, as Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, as Directors thereof, therefore pray this Honorable Court that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

HENRY MOORE, JR., AND
JAMES D. HEAD,
Attorneys for Appellants.

The foregoing appeal is allowed this twenty-first day of February, 1922, conditioned upon the filing with the Clerk of this Court of a good and sufficient bond for costs only in the sum of $500.00 within ten days from this date, said bond to be approved by one of the Judges of this Court.

WALTER H. SANBORN,
Senior United States Circuit Judge for the Eighth Circuit.

February 21, 1922.

Assignment of Errors.

The appellants in the above entitled cause in connection with their petition for appeal herein, present and file herewith their assignment of errors, as to which matters and things, they allege that the decree herein entitled is erroneous, to-wit:

First. The Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that Act No. 186 of the session of the General Assembly of the State of Arkansas of the year 1915, as amended by Act No. 79 of the General Assembly of the State of Arkansas of the year 1917, in its application to the said The Kansas City Southern Railway Company and the Fort Smith Railway Company, and both and each of them, is in conflict with the Fourteenth Amendment to the Constitution of the United States.

Second. The said Circuit Court of Appeals for the Eighth Judicial Circuit erred in holding that said Act, as applied to said Railway Companies, levied a tax upon the intangible properties of each of said railways, and that included in the assessed valuation of said railways, and each of them, was included intangible values of said roads and each of them.

Third. Said Circuit Court of Appeals erred in holding that said Act, as amended, imposed a higher rate of taxation on the railroad properties of the appellees, and each of them, than it did on other property in the district, by reason of the fact that its franchise and other intangible property is included in its assessment.

Fourth. The said Circuit Court of Appeals erred in holding that the evidence showed the track of the said railway companies in said district would be taxed to the extent of half of the amount of the cost of the improvement.

Fifth. Said Circuit Court of Appeals erred in holding that the evidence in the cause failed to show that the track of the railway companies in said district derived any benefit from the building of the improvement contemplated by said district.

Sixth. Said Circuit Court of Appeals erred in holding that said act as applied to the railroad property of the appellees was so palpable and arbitrary as to deny the appellees the equal protection of the law.

Wherefore, appellants pray that said judgment and decree of said Circuit Court of Appeals for the Eighth Circuit be reversed, and that the appellants may have an adjudication and decree in their favor as herein specified.

HENRY MOORE, JR., AND
JAMES D. HEAD,
Attorneys for Appellants.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 21, 1922.

(*Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents:

That we, Will F. Thomas, Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank Ethridge, Directors, as principals, and the

undersigned United States Fidelity & Guaranty Company as surety, are held and firmly bound unto the Kansas City Southern Railway Company and the Texarkana and Fort Smith Railway Company, their successors and assigns in the sum of Five Hundred ($500.00) Dollars, to be paid to the said appellees or their successors or assigns; we bind ourselves and each of our heirs, executors, administrators and successors jointly, separately and firmly by these presents. Sealed with our seals and dated the 23rd day of February, 1922.

Whereas, the appellants in the above entitled cause have prosecuted an appeal to the Supreme Court of the United States, to reverse the decree rendered and entered in said cause in the Circuit Court of Appeals for the Eighth Circuit on the 13th day of December, 1921;

Now, therefore, the conditions of this obligation is such that if the said appellants shall prosecute the said appeal to effect and answer all costs if they fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

WILL F. THOMAS,
Sheriff and Collector, Little River Drainage and Levee District of Sevier County No. 1;
E. W. BEESON,
G. A. HENRY, AND
FRANK ETHRIDGE, *Directors,*
By HENRY MOORE, JR., AND
JAMES D. HEAD,
Attorneys.

[SEAL.]

UNITED STATES FIDELITY & GUARANTY COMPANY,
By H. F. OFFENHAUSER,
Attorney in Fact,
Surety.

The foregoing bond approved this 24th day of February, 1922.
WALTER H. SANBORN,
Senior U. S. Circuit Judge.

(Attached to the original bond is the Power of Attorney of the United States Fidelity & Guaranty Company to Henry F. Offenhauser.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 24, 1922.

Citation.

UNITED STATES OF AMERICA:

To the Kansas City Southern Railway Company and Texarkana and Fort Smith Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within

thirty days from and after the date hereof, pursuant to an app
allowed and filed in the Clerk's Office of the United States Cir
Court of Appeals for the Eighth Circuit, wherein Will F. Thom
Sheriff and Collector, Little River Drainage and Levee District
Sevier County No. 1, E. W. Beeson, G. A. Henry and Frank E
ridge, Directors, are Appellants and you are appellees, to show cau
if any there be, why the decree rendered against the said appella
as in said appeal mentioned should not be corrected and why spe
justice should not be done to the parties in that behalf.

Witness, the Honorable Walter H. Sanborn, Senior United Sta
Circuit Judge in and for the Eighth Circuit, this twenty-first
of February, A. D. 1922.

WALTER H. SANBORN,
Senior United States Circuit Judge
for the Eighth Circuit.

The undersigned appellees waive formal service of this writ
the Marshal and accept service thereof and enter their appearan
on said appeal.

Done at Fort Smith, Arkansas, this February 25, 1922.

THE KANSAS CITY SOUTHERN RAILWAY
COMPANY AND
THE TEXARKANA & FORT SMITH RAILWAY
COMPANY.
By JAMES B. McDONOUGH,
Their Attorney of Record.

[Endorsed:] U. S. Circuit Court of Appeals Eighth Circuit. N
5489. Will F. Thomas, Sheriff and Collector, etc., et al., Appellant
vs. Kansas City Southern Railway Company, et al. Citation on A
peal to Supreme Court, U. S., and acceptance of service. Filed Fe
27, 1922. E. E. Koch, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeal
for the Eighth Circuit, do hereby certify that the foregoing contain
the transcript of the record from the District Court of the Unite
States for the Western District of Arkansas as prepared and printe
under the rules of the United States Circuit Court of Appeals for th
Eighth Circuit, under the supervision of its Clerk, and full, true an
complete copies of all the pleadings, record entries and proceedings
including the opinion, had and filed in the United States Circui
Court of Appeals, except the full captions, titles and endorsement
omitted in pursuance of the rules of the Supreme Court of the Unite
States, in a certain cause in said Circuit Court of Appeals wherei
Will F. Thomas, Sheriff, etc., et al., were Appellants, and the Kansa
City Southern Railway Company et al., were Appellees, No. 5489

as full, true and compelte as the originals of the same remain on file and of record in my office.

I do further certify that on the thirteenth day of February, A. D. 1922, a mandate was issued out of said Circuit Court of Appeals, directed to the Judges of the District Court of the United States for the Western District of Arkansas.

I do further certify that the original citation with acceptance of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this third day of March, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk U. S. Circuit Court of
Appeals for the Eighth Circuit.

Endorsed on cover: File No. 28,762. U. S. Circuit Court Appeals, 8th Circuit. Term No. 807. Will F. Thomas, sheriff and collector, Little River Drainage and Levee District of Sevier County No. 1, et al., appellants, vs. Kansas City Southern Railway and Texarkana and Fort Smith Railway Company. Filed March 11th, 1922. File No. 28,762.

OCT 30 1
WM. R. STA

No. [redacted] 303

IN THE

Supreme Court of the United States

WILL F. THOMAS, SHERIFF AND COLLECTOR ET AL., APPELLANTS,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

JAMES D. HEAD and
HENRY MOORE, JR.,
Attorneys for Appellants.

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No. 807.

IN THE

Supreme Court of the United States

WILL F. THOMAS, SHERIFF AND COLLECTOR ET AL., APPELLANTS,

VS.

KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

BRIEF FOR APPELLANTS.

Little River Drainage and Levee District of Sevier County No. 1 was created by Act 186, page 747 of the Acts of the Legislature of Arkansas of 1915, and the individual appellants were, by the terms of said Act, named as directors of said district; as then constituted, the district embraced about twenty-eight thousand acres of land. By Act 79 of the Acts of 1917, page 348, the original Act was so amended as to eliminate from the

east side of the district a large portion of the lands originally embraced therein, fixing new boundaries and leaving in the district about twelve thousand acres.

The purpose of the district was, by a system of levees and drains, to reclaim all of the swamp lands of the district and to protect all lands, including the roadbed and right of way of the railroad from periodical overflows by Little River. Only ten per cent of the lands in the district was susceptible of cultivation without drains and levees.

Through the western side of the district ran the railroad owned by the Texarkana and Ft. Smith and operated by the Kansas City Southern Railway and by the tentative plans adopted by the commissioners, the levee was to be built on the western line of the district, thus protecting said railway from overflow from the waters of Little River which, in times of high water, submerged it and the lands in the district. By the Act the directors were ordered to have surveys made and adopt plans and specifications for the improvements, and it was provided that said board should have the power to levy annually a tax upon the assessed valuation of the real property in the district, as it appeared each year upon the assessment books, not exceeding in any one year, the sum of six per cent on such assessed valuation, to defray the expenses of the improvement. The Act carried the usual clauses for the issuance of bonds and making of contracts. The sheriff and collector of Sevier County was directed to collect from the various property owners in the district the taxes

levied against the lands therein, at the time of the collection of the general state and county taxes.

After the passage of the Amendatory Act in 1917, the directors passed a resolution levying a tax upon all of the real property in accordance with the assessment thereof, of six per cent of the assessed valuation thereof, pursuant to the provisions of the Act, and the collector of Sevier County, Will F. Thomas, was proceeding to collect such taxes, so levied, when the appellees filed their bill in the District Court of the United States for the Western District of Arkansas, Texarkana Division, seeking to enjoin the collection thereof, upon the grounds, among others, that the taxes were confiscatory and deprived appellees of their property without due process of law, contrary to Section One of the Fourteenth Amendment to the Constitution of the United States. Issue was joined by answer denying the allegations of the complaint and alleging that the railroad was benefited by the improvement; that the legislative acts creating the district were valid, and that the taxes levied were proper.

A temporary restraining order was issued and on a trial on the merits the district judge found that the basis of assessment was fixed by the Legislature and the benefits by it determined; that indirect benefits would accrue to the railroad company by reason of probable increased traffic (R. 17). The court also held that the assessments against the property of the appellees included their franchise (personal property) and that by reason thereof, appellees were deprived of their property

without due process of law, contrary to Section One of the Fourteenth Amendment (R. 18).

From the decree of the district judge, an appeal was taken to the Circuit Court of Appeals which resulted in a judgment affirming the decree of the lower court, but on different grounds (see Opinion, 277 Federal, 708) (R. 158). The Circuit Court of Appeals held that the judgment of the lower court was based upon an erroneous ground, in that it followed and applied the law as determined by said Circuit Court of Appeals in *Bush* v. *Branson*, 248 Federal, 377, to the effect that the franchises of the railroad were included in the assessment and hence both personal and real property of the appellees were taxed while only the real property of the other owners were taxed and, in the opinion, said that the lower court had correctly construed the law as applied by the Circuit Court of Appeals, but that this case had been reversed by the Supreme Court (251 U. S. 182), and, therefore, the ground upon which the court based its decree was untenable.

The Circuit Court of Appeals determined every issue for the appellants, save and except that the assessment of benefits is unjust, arbitrary, illegal and void, and held that the case revealed an instance of discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law and affirmed the decree of the lower court upon that ground (R. 158-162). From that decree, this appeal is now prosecuted.

Since there was no cross appeal by the appellees, either from the decree rendered by the District Court or

that rendered by the Circuit Court of Appeals, practically the only legal question involved is whether the facts do reveal an instance of discrimination so palpable and arbitrary as to amount to a denial to the appellees of the equal protection of the law.

ASSIGNMENT OF ERRORS.

Of the assignments of error, the appellants rely upon the following, to-wit:

(1) That the Circuit Court of Appeals erred in holding that, included in the assessment of the railroads was the intangible value of said roads, and that a higher rate of taxation was imposed upon the railroad than on other property in the district.

(2) That the property of the railroad would be taxed to the extent of half of the amount of the cost of the improvement.

(3) That there was no direct benefit to the property of the appellees from the construction of the improvement.

(4) That, as applied to the railroad property of appellees, the tax levied was so palpable and arbitrary as to deny appellees the equal protection of the law (R 164).

Acts Creating the District.

Those portions of the Acts creating this district which are pertinent to the issues are as follows:

By Section Four of the Acts of 1915, it is provided:

> "The board of directors of the Little River Drainage and Levee District of Sevier County shall have power, and it is hereby made its duty to assess and levy annually a tax upon the valuation as it shall appear each year upon the assessment books

of Sevier County, Arkansas, upon all lands and tramroads and on natural gas and pipe lines, telephone and telegraph lines and upon the railroad tracks of companies in said district, as appraised by the board of railroad commissioners, or their successors, not to exceed, however, in any one year, the sum of six per cent of the assessed valuation of said property within the district."

Section Twelve of the Amendatory Act of 1917, is, in so far as pertinent, as follows:

"The tax collector of Sevier County, Arkansas, shall be and act as collector of levee taxes of the said district. He shall be notified each year by the secretary of the board the per cent that is to be collected that year as drainage and levee taxes of the assessed valuation of the lands * * * railroads * * * or other property taxable by said drainage and levee district. The said collector shall proceed to collect such drainage and levee tax at the same time and place as provided by (law) for the collection of state and county taxes * * * and if he shall fail to collect the drainage and levee taxes along with the other taxes, he shall be subject to a penalty of fifty dollars for each instance in which he shall collect from an individual firm or corporation the other taxes and willfully or wrongfully omit to collect said levee and drainage taxes * * *; and the secretary of said board shall make out and furnish to said collector each year a book or books in which shall be listed the lands * * * railroads * * * and other property in the drainage and levee district, and in separate columns opposite the lands * * * railroads * * * and other property shall be placed the names of the supposed owners, the amount of the levee and drainage taxes to be collected that year."

"All taxes levied under the terms of this Act

> shall be payable between the first Monday in January and the tenth day of April of each year * * *."

In its decree (R. 17), the District Court found that appellees' property would be benefited by increased traffic resulting from the improvement, but that no direct benefits would accrue to their property; that the assessment against their property included appellees' franchises and that by reason thereof the assessment deprived appellees of their property without due process of law, and (following *Bush* v. *Branson*, 248 Federal, 377, later reversed by this court, 251 U. S. 182), granted a perpetual injunction against the collection of said assessment. The district appealed but there was no cross appeal by appellees. In the Circuit Court of Appeals it will be seen by reference to the opinion (R. 158-162) that said court held the basis for the decree of the lower court was insufficient because of the reversal by this court of the Bush-Branson case, upon which the decision was bottomed.

The Court of Appeals agreed with the lower court in holding that indirect benefits resulted to the railroad by the improvement, but held that the cost and expense thereof, although increasing the value of the acreage property a quarter of a million dollars, would be paid, half by appellees and half by the acreage, while the benefit to appellees by reason only of increase in traffic was problematical and, hence, the case revealed an instance of discrimination so arbitrary as to deny appellees the equal protection of the law.

Questions Arising Upon the Record.

Since there is no cross appeal here and none from the decree of the District Court, the questions arising may be stated as follows:

(1) Was there any direct benefit to the railroad by reason of the contemplated improvement?

(2) Conceding there were no direct benefits to the railroads, but that their property was indirectly benefited, was it subject to taxation?

(3) Would the railroads be required to pay half the cost of the improvement as found by the Court of Appeals?

(4) Did the assessment, as made, deny to the appellees the equal protection of the law?

Benefits.

Since the District Court found indirect benefits resulting to the property of appellees by increased traffic and that finding was affirmed by the Circuit Court of Appeals, there remains in question, with reference to benefits, only whether appellees' property received direct benefits. Appellants contend that the record discloses substantial direct benefits would have resulted to appellees from the improvements. It should be remembered that the district was created by legislative act, which implies a determination that all of the real property in the district was equally benefited in accordance with the valuation of said property as assessed for state and county purposes. This legislative determination of benefits may not be inquired into for mere error of judg-

ment, and can be defeated only upon the ground that it is arbitrary, unjust and unreasonable and made without regard to benefits; demonstrable mistake on the part of the Legislature must be shown.

Turning then to the evidence on the part of the railroads, it will be seen that none of its witnesses were familiar with the improvements contemplated, the extent of the district, the drains and levees proposed to be constructed, nor the effect that the improvements would have upon the water from Little River, which, without the improvements, would flow against and under the railway tracks.

There was a trestle 500 feet long in the district at Neal Springs which had been washed out by an overflow of Little River in 1915 and several bents thereof washed away, thereby entailing on the railroads expensive delays and reconstruction. This trestle, save and except a small portion necessary for surface drainage, appellants contend could be eliminated by the construction of the proposed improvements and, thereby, the railroads could have substituted therefor an earthen dump which was more safe and less expensive to maintain.

To sustain their contention, appellees introduced their tax commissioner, D. Phelps, who did not claim to be an engineer nor an expert in drainage and levee protection; Phelps testified that the road would not be benefited (R. 27). He admitted that he had no knowledge of engineering and did not even know that the trestle at Neal Springs had washed out in the overflow

of 1915 (R. 34). That in his judgment only railroad officials should be allowed to say what improvements would benefit the road (R. 35). That trestles were maintained by railroads not from choice but from necessity (R. 36-7).

The division engineer for the railroads testified:

That the track of the railroads in the district had never overflowed to his knowledge, and that he had never seen the water so high that it ran under (over) the trestle at Neal Springs, and that he did not know whether the water went over the railroad in 1915 (R. 39-40). That he did not know whether the rails were above high water (R. 39-40).

J. M. Weir, chief engineer, testified:

That the improvements, in his judgment, would not be beneficial and might be detrimental; that he did not know where the levee was to be built; that speaking generally, a trestle was more expensive to maintain than an embankment; that with a levee of sufficient height, you could possibly cut out that trestle but would have to increase the opening at the river. That he had never figured whether the main channel at the bridge was sufficient to carry off all the water, but knew from the records of the company the opening at the river was pretty well occupied. That he did not see why a levee would result in benefit and assuming a levee sufficiently high to keep off the water, there would be a benefit to that extent; that he did not know the trestle had been washed out, but understood there was a slight washing in 1915, and knew that there was some delay to traffic; that de-

layed traffic meant expense to the railroad. That he knew nothing of the district east of the road and had made no survey of the vicinity (R. 52-53).

The manager for appellees stated he had been with the roads since 1906. That the road bed in the district did not overflow in 1915, and the water then was three and one-half feet higher than it had been known (R. 55). That the opening (trestle referred to) was an old channel of the river and was left to take care of overflow water; that it could be closed, but would not be advisable from an engineering standpoint, and if closed the main channel at the river was not sufficient to take care of the water. That it would cost $2700.00 to fill in this trestle; that the improvements would, in his judgment, be no benefit, as the embankment is old, well settled and above high water (R. 56-57). That three bents of the trestle were lost in the overflow in 1915 and caused expense of repair and delay of about thirty hours (R. 60); that this delay held up the usual trains, more than half a dozen. That he did not know the elevation of the ground at the east part of the district (R. 60); that, in general, a dump is cheaper than a trestle and the element of safety is a good deal in favor of the embankment (R. 62). That it is more expensive to maintain the trestle than the rest of the track, figuring replacement, and that if a levee were built of sufficient height to keep off the water, this would be a distinct benefit, but he did not think it good engineering, as the opening was required under the present conditions and, to close that opening, would require another at some

other place. That he does not know whether the closing of this trestle would raise the water level at the river (R. 62-63). That he would not close this trestle if the levee were six feet above high water mark for the levee might break (R. 65). The witness then figured that the difference in cost of the maintenance of a trestle and a dump (including however the cost of the trestle itself since it is there), would be one hundred and thirty-nine dollars per annum in favor of the embankment (R. 136-137).

F. C. Peck, a contractor, testified:

That he had been acquainted with the road for twenty years at Neal Springs and that he did not think it would receive any benefits from the improvement; that he did not know the height of the proposed levee (R. 67-68). That if we had another overflow like 1915 the trestle would probably go out again (R. 68).

J. J. Taylor, appellees' superintendent of bridges and building said that although four bents of the trestle went out in 1915 the railroad would receive no benefit; that the levee would not obviate the necessity of a trestle, for it would be dangerous, if the levee should break, and additional opening would be required (R. 69). That he was not an engineer and had not been over the district; it is less expensive to maintain a dump than a trestle and the element of safety is in favor of the dump and if the trestle could be eliminated the railroads would be benefited and if a good levee were built the only question would be whether the opening at the bridge would take care of the water, and he thought the opening insufficient (R. 73).

J. J. Hancock, road master for appellees said the road was in good condition; that three bents of the trestle (in the district) went out in 1915; that the road did not need drains or ditches and would receive no benefits (R. 76-77). That with a levee sufficient to keep out the water there would be some benefit. That the cost of upkeep as between the trestle and dump, after construction and after the ground set, would be less. That he did not know what drains or levees were proposed to be built (R. 78-79).

C. S. Christian, engineer for the district, said that for twelve years he had been engaged in levee and drainage work, having been connected with various projects, among others the St. Francis Drainage and Levee District, a drainage district in Missouri, covering three hundred thousand acres, Miller Levee District No. 2, Bowie Levee District No. 1, Red River Levee District No. 1, Lost Prairie Levee District and other (R. 106-108); that he caused a survey to be made and levels taken of the district (R. 109-112). Witness then gave the various levels of the district and stated that the bridge of appellees at Little River would carry the increased flow of water with a levee built as proposed and with the trestle at Neal Springs closed (R. 115); that the proposed levee would be two feet higher than the overflow of 1915 (R. 117); that to build the levee on the east side of the railroad would necessitate crossing three sloughs and going over low land which would be very expensive; the cost of building on the west side was five thousand dollars against twenty thousand on

the east side (R. 120-121). That the construction of the improvements would result in benefit to the railroads in increased tonnage, in better health conditions and to some extent save the cost of upkeep, for the roads could close the trestle or shorten it very materially and thus reduce the cost of maintenance (R. 118). That to replace the trestle at Neal Springs would cost twenty-five dollars a foot and that to fill in the trestle with dirt would cost about five thousand dollars (R. 131).

E. W. Beeson, one of the appellants testified:

That appellees line of road was the only one serving this district; that the lands are worth little without the levee; that if a levee were built they would be as good as the best, and ninety per cent with drainage would make good corn and cotton; with the improvements all these lands would be cleared and put in cultivation. The crops in this vicinity were marketed over appellees' lines; that the improvements would benefit the health of the community (R. 84-86). That lands in cultivation are worth fifty dollars per acre and with drainage would be worth one hundred dollars; unimproved the lands are not selling for more than eight to ten dollars, but would be more than doubled in value with the improvements; the improved lands are assessed at from ten to fifteen dollars an acre, while the unimproved range from two and a half to six dollars per acre (R. 86-87).

G. B. Pride, a merchant at Horatio for many years, stated that all incoming and outgoing freight in this vicinity came and went over the lines of appellees; that the improvements would result in additional tonnage go-

ing in and out of the vicinity, and the railroads would receive this benefit (R. 93-95).

Joe Greer, a farmer, testified:

That the lands would produce a bale of cotton and sixty-five bushels of corn per acre; that the crops were shipped out over the line of appellees road; lands in cultivation in the district are worth one hundred dollars, while those not in cultivation are worth from thirteen to forty dollars; and with drainage their value would be doubled (R. 99-100).

G. A. Henry, one of appellants, testified:

That the cultivated lands in the district formed only ten per cent of the area; these lands are merely patches drained by sloughs; that outside of these patches the lands cannot be cultivated on account of overflow. The overflow of 1915 destroyed the crops on the patches referred to; with levees and drains the lands would bring three-fourths of a bale of cotton and fifty bushels of corn on an average per acre, and if thus protected these lands would be put in cultivation (R. 101-102).

W. W. Millwee, testified:

That there are about twelve thousand acres in cultivation and eleven thousand acres of wild, or unimproved, land in the district (R. 81).

The proof of the railroad is clearly insufficient to overturn the finding of the Legislature that direct benefits result to it and falls far short of showing either arbitrary action or demonstrable mistake. In the early days of improvement legislation the Arkansas Court

adopted the following rule from 2 Cooley on Taxation, third edition, page 1207-8:

> "It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must, in general, be deemed to be conclusive No doubt there may be exceptions."

Lennon v. *Brady*, 81 Ark. 208.

To the same effect see *Railway Company* v. *Grayson*, 72 Ark. 127.

> "The action of a city council in including property in an improvement district is conclusive of the fact that it is adjoining the property to be affected, except when attacked for fraud or demonstrable mistake."
>
> *Little Rock* v. *Katzenstein*, 52 Ark. 107.
>
> "But such fraud or demonstrable mistake can occur only when the assessments are levied on land entirely regardless of the benefits and by reason of a manifest prejudice against the owner, or in a total reckless disregard for his rights. If the property is benefited to any extent by the improvement, then it can be included in the district; and the mere fact that the benefits assessed against it are exorbitant or excessive, would not invalidate assessments thereon." *Board* v. *Pollard*, 98 Ark. 550.

In *Board* v. *Offenhauser*, 82 Ark. 268, the court said:

"It has been repeatedly decided that the legislative act of assigning district for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits, and defeated by satisfying a court that no special and peculiar benefits are received."

"The legislative determination should be, and is, conclusive unless it is arbitrary and without any foundation in justice and reason," *L. & A. Ry. Co. v. State*, 85 Ark. 12.

In *St. Louis, Iron Mountain and Southern Railway Company v. Board*, 103 Ark. 134, the court held:

"After a Legislature has determined that a certain area * * * will be benefited by the improvement, it is not a question for the courts to determine upon a *preponderance of the evidence* as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of the power of the Legislature in creating improvement districts that will be reviewed by the court."

The Arkansas court in *Fellows v. McHaney*, 113 Ark. 370, said:

"The Legislature ascertained and declared that the assessment previously made was a proper one * * * and its action in so doing is beyond judicial review in the absence of a showing that the assessment so validated was arbitrarily made regardless of benefits or without a showing that no benefit could possibly accrue from the improvement sought to be made." * * *

"By this Act of 1913 the Legislature ascertained and declared that the assessment previously made was a proper one and validated it, and its action in so doing is beyond judicial review, in the absence of a showing that the assessment, so validated was

arbitrarily made regardless of benefits, or without a showing that no benefit could possibly accrue from the improvement sought to be made to the property sought to be taxed."

In a case where the court held that the benefits were anticipated and estimated in advance and that if said benefits did not accrue, still the land was required to pay in proportion to the benefits fixed by the Legislature, it was said:

> "Mere mistakes of the law-makers, or of those empowered by the law-makers to make assessments, in fixing the amount or rate of assessment, will not be reviewed and corrected by the court. There is no merit in the contention that the appellant's lands cannot be taxed because the levee was not properly constructed, or because it has caved away, so that it no longer affords protection from overflows. The anticipated benefits were estimated in advance and the assessments were levied accordingly and the fact that the benefits have not been fully realized affords no avenue of escape from payment of assessments to defray the cost of the improvements." *Salmon* v. *Board of Directors*, 100 Ark. 369.

The Arkansas court again had under consideration this proposition in a railroad case and there said:

> "It has been held that the amount of the benefits which such officials have found and determined to accrue to each lot and parcel of property in a district by reason of the improvement will be presumed to be correct and just and the courts will not disturb same until the contrary has been shown by the evidence. Such evidence must consist not *merely of opinions that the assessments are excessive*, but of facts which will overturn the *prima facie* fairness and equality of the assessment estab-

lished by the returns of the assessors," *Improvement District* v. *Railroad*, 99 Ark. 521.

The same proposition was affirmed by the Arkansas court in a later case in the following language:

> "It being a controverted question of fact, with sufficient evidence to show that appellants' property was benefited, the conclusion of the Legislature to that effect must stand."

Ry Co vs Board 103 Ark 134

Again the Arkansas court laid down the same rule in the following language:

> "Mere mistakes of the law-makers or of those impowered by the law-makers to make assessments, in fixing the amount or rate of assessments, will not be reviewed and corrected by the court," *Board of Directors* v. *Crawford Co. Bank*, 108 Ark. 422.

The same proposition was announced in another case as follows:

> "We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value of the property benefited will be respected unless it be demonstrated to a certainty that a mistake has been made," *Board* v. *Gas Company*, 110 Ark. 121.

The Supreme Court of the United States has often recognized and applied the principles announced by the Arkansas court in the above cases, and in an irrigation case, it was held as follows:

> "The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other

or further hearing upon that question." *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 155.

To the same effect see the following cases:

Webster v. *Fargo*, 181 U. S. 394.

L. & N. R. Co. v. *Barber Asphalt Paving Co.*, 197 U. S. 434.

Spencer v. *Merchant*, 125 U. S. 345.

Webster v. *City of Fargo*, 181 U. S. 394.

Under the record, it is evident that the testimony of the railroad fails to approach that degree of certainty required to overturn the legislative finding of benefit. The witnesses for the railroad were not levee or drainage engineers; while one or two were engineers, yet, they had not taken any levels and had no means of determining whether the proposed levee when constructed would be sufficient to prevent overflows by Little River. Practically all of the witnesses for the railroad agreed that an embankment is much safer than a trestle; that, in the event the levee would protect the railroad from the overflow waters of Little River, direct benefits would follow; some intimated that the bridge over Little River was insufficient to take care of the increased water, but all admitted they had not made any survey or calculations to determine that question.

On the other hand, the district starts out with a legislative determination of benefits; we know that Little River in 1915 washed out three bents of the trestle in the district. We know that the levee west of the railroad was to be built two feet above the 1915 overflow, the highest ever known. The engineer for the district, a man experienced in drainage and levee work, after a

survey, testified that the railroad company could eliminate this long five hundred foot trestle, except a small portion necessary for surface drainage and that the railroad would be benefited by diminished upkeep, increased traffic, and by better health conditions; he was familiar with every foot of the ground and with the plans for the improvement, while the engineers of the railroad were unfamiliar with the district, and its plans and had made no survey but expressed their judgment that no benefit would accrue merely because they did not deem it good railroading to eliminate the trestle, since the levee might break. With as much assurance, the farmers protected by the stupendous system of levees along the Mississippi River could contend that they were not benefited as the levees might break and their lands might be damaged; yet, in the evidence, the only foundation for this contention is the conjecture that there might be a breach in the levee.

We, therefore, submit, a finding that no direct benefit would accrue to the railroad is merely a substitution of the judgment of the court for that of the legislature; that it is nothing short of a determination of that fact upon conflicting testimony and that too, when the testimony for the district was based upon actual survey and full knowledge of the plans, by a man experienced in levee and drainage work, while that of the railroad is purely the conjecture of men without knowledge by survey or otherwise of the conditions or of the location or extent of the improvement. Unless the rule of law enunciated both by the Arkansas court and this

court in the many decisions referred to, to the effect that on conflicting testimony arbitrary action or demonstrable mistake of the legislature will not be inferred, and that, in general, the finding of the legislature as to benefits is conclusive, be wholly disregarded, we feel that the court must be constrained to hold that direct benefits would result to appellees' property.

Assessments not Discriminatory.

The Circuit Court of Appeals has held that while the acreage property would be benefited to the extent of a quarter of a million dollars, and would only be required to pay half the cost, yet the property of appellees, which was benefited only by problematical increase of traffic, would bear the other half. We respectfully submit that, in this conclusion, the court fell into an egregious error, a demonstrable mistake. The testimony on the part of E. W. Beeson (R. 84-87), G. B. Pride (R. 93-95), Joe Greer (R. 99-100), and G. A. Henry (R. 101-102), it is true, shows that the value of the acreage property would be more than doubled; and that the lands were worth unimproved from eight to twelve dollars per acre, yet, with the improvements, the lands would be worth from fifty to one hundred dollars; that the cultivated lands (which are mere patches) are assessed at from ten to fifteen dollars per acre, while the assessment on the unimproved lands ranges from two and a half to six dollars.

It is true that approximately one-half of the tax under the present levy and under present conditions

would be paid by the roads, but that condition would not long prevail and the court evidently failed to consider this pertinent fact. The legislature evidently assumed this large and fertile area of sloughs and swamps, habited now only by reptiles and frogs, would be quickly transformed into fallow fields of yellow corn and whitening cotton, and would increase in valuation as the land was put in cultivation and that thus, the burden of taxes would be removed from the railroad and placed upon the acreage property.

D. Phelps, tax commissioner for appellees in his testimony (R. 31-32) shows that railroad and other real property is assessed for taxation for state and county purposes at one-half of its real value. The testimony for the district shows that all of these lands would be put into cultivation as soon as the improvements were made, and that lands now assessed at from ten to fifteen dollars per acre, were cultivated and from two and a half to six dollars ~~were~~ where unimproved, would immediately become worth not less than fifty and probably one hundred dollars and, therefore, would necessarily be assessed at from twenty-five to fifty dollars per acre. Real estate in Arkansas is required to be assessed every two years. The statute, in so far as pertinent, is as follows:

> "The assessor shall, on or before the first day of December in each odd numbered year, file his report of assessment of real estate with the county clerk in books of the kind and character furnished him by the county clerk for the purpose of assessing such real estate * * *" Crawford & Moses' Digest, Section 9921.

Therefore, when these lands are levied and drained the twelve thousand acres would be worth at least $600,000.00 and on a fifty per cent basis, would be assessed at $300,000.00, while the railroad assessment would vary little, if any, from its present amount, $69,-910.00 (R. 31). With the improvements, these lands will be opened and cultivated and instead of the railroad paying half of the taxes it would only pay approximately one-fifth thereof, assuming the minimum value, as shown by the proof of the lands when improved; assuming the maximum value of one hundred dollars per acre, then the railroad would be paying only one-tenth of the taxes.

We, therefore, respectfully submit that the Circuit Court of Appeals failed to take into consideration conditions as they will be when the improvements are made and hence fell into the error of holding that the railroad would be required to pay one-half of the taxes.

Due Process of Law.

The Circuit Court of Appeals held, on the erroneous premise that, since the railroad would pay half the cost of the improvement, while the acreage property which was benefited to the extent of a quarter of a million dollars would pay the remainder, this was a taking of their property without due process of law. We think the court erred in holding that the only benefits to the railroad were from increased traffic; but, assuming that the increased traffic was the only benefit and that the railroads made such a *prima facie* case as to overturn the

findings by the legislature of direct benefits, yet, we feel that the court misconceived the purport of the decisions, both of the state court and this court, as to the effect of mere errors or inequalities in assessments. We assert that where the assessment has been made by the legislature it may not be overturned by reason of inequalities, for no scheme may be found whereby exact justice can be done in assessments. Moreover, we think it clear, that the 14th amendment may not be used as a cloak to overturn the ordinary and general tax policies of the states.

In the early case of *Railway Company* v. *Grayson*, 72 Ark. 120, the Arkansas court, quoting *Spencer* v. *Merchant*, 125 U. S. 345, laid down the proposition of law, which we contend should be here applied, as follows:

> "The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so; and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review. * * * No hearing would open the discretion of the legislature or be of any avail to review or change it. * * * The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers."

In an Arkansas case, where the railroad contended that since its track was already above overflow it would receive no benefit from the building of a levee and produced proof to sustain its contention, the court said:

"It is not necessary that it should receive absolute protection from overflow, or that it should have been entirely without protection and subject to inundation before the levee was built. *Whether it was benefited to an extent equal to that of other property in the district, we do not consider it necessary to determine.* That was a matter largely for legislative determination in fixing the boundaries of the district and providing for the method of assessment of taxes. That it was a matter for legislative inquiry and determination, and that the courts must respect such determination is settled, so far as it can be done by the decision of this court, in the case of *Railway Company* v. *Grayson*, 72 Ark. 119, and that decision is in accordance with the authorities generally," *Railway Company* v. *Board of Directors*, 81 Ark. 562-565.

A district was created in Jackson County, Arkansas, which included the right of way of a railroad; the railroad claimed not only that it received no benefits, but that its roadbed was damaged by the improvement and introduced its engineers, as experts, to show the damage; the court held:

"After the legislature has determined that a certain area which it has organized into an imimprovement district will be benefited by the improvement, it is not a question for the courts to determine under a preponderance of the evidence, as to whether or not the legislative judgment has been properly exercised. It is only an arbitrary and manifest abuse of power of the legislature in creating a district that will be reviewed by the courts." *Ry. Co.* v. *Board of Directors*, 103 Ark. 134.

The legislature created a bridge district to erect a bridge over the Arkansas River between Ft. Smith and Van Buren. The Frisco Railroad owned the only bridge across the river; it attacked the district on the ground that the bridge would be a detriment, in that traffic would be diverted from its railroad; it was shown that the earnings in freight traffic had decreased since the bridge went into operation, but the court held that this might have been due to poor crops; that future benefits are speculative and that the growth of population might be expected to increase the traffic; that no exact standard of benefits could be found and since there was some evidence of benefits, the assessment must be upheld. The court said:

> "The assessment of future benefits is largely a matter of estimate and, to some extent speculative. As was stated by Mr. Justice Holmes in the case of *Louisville & Nashville Ry. Co.* v. *Barber Asphalt Co.*, 197 U. S. 430, 'the amount of benefit which an improvement will confer upon particular land, and indeed, whether it is a benefit at all, is a matter of forecast and estimate, and on the question of benefits, the present use is simply a prognostic and plea of prophecy' * * *. If it were necessary to find an exact standard, a measure of benefits in advance would be impossible." *St. Louis & S. F. Ry. Co.* v. *Bridge District*, 113 Ark. 496.

In *St. Louis & S. W. Ry. Co.* v. *Grayson*, 72 Ark. 120, the act creating the district was so drawn as to include the track and roadbed of the railroad, but no lands to the east of the track were included; the railroad

claimed that its track would not be benefited as it was on the eastern boundary of the district and that the act deprived it of its property without due process of law; the Arkansas court held, however (and it is directly in point here) that, since the legislature had fixed the district and levied the taxes, its action must be deemed conclusive.

In *Alcorn* v. *Bliss-Cook Oak Company*, 133 Ark. 122, where the testimony was that the lands of the oak company did not derive as much benefit as other lands, the court held it unnecessary to consider the testimony on that point, and said:

> "It is impossible to foresee exactly how a proposed tax will fall. The object is that the burden should be distributed as nearly as may be in proportion to the benefits derived, and for that reason the legislature is entrusted with the entire control of the subject."

In another case in the Arkansas court where the testimony of the railroad employes was, as here, that no benefits would be received, the court, in upholding the assessment, said:

> "No attempt was made to prove fraudulent, or capricious or arbitrary action on the part of any officials in making the assessment, the only evidence upon the subject being the opinions of four employes of the company that the improvement of the road would not benefit the railroad property, and if inequality has resulted from the application of the state law in a customary manner to a situation frequently arising in our country, it is an incidental inequality resulting from a valid classification of railroad property for taxation purposes

which does not fall within the scope of the Fourteenth Amendment, which was not intended to compel the states to adopt an iron rule of equal taxation," *Mo. Pac. R'd Co.* v. *Conway County Br. Dist.*, 142 Ark. 14.

In another legislative district, organized to drain lands of back water, before the Arkansas court, the railroad and other property owners, contending that their lands were not benefited, the court said:

> "The statute very plainly constitutes a legislative determination that benefits will accrue in proportion to the valuation of the land in the district, and adopts the assessment made for purposes of county and state taxation as a basis of valuation. An annual tax not to exceed ten per centum of the assessed valuation is authorized. This is the method adopted by the board of directors. This court has decided that a legislative determination that benefits from a given improvement will accrue in proportion to valuation must be respected by the courts unless found to be arbitrary and demonstrably erroneous, and that such a method of arriving at the benefits from the improvement is valid. (Citing many cases.) That principle has often been recognized and applied by the Supreme Court of the United States in similar cases." (Citing *Webster* v. *Fargo*, 181 U. S. 394; *Railway Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 434; *Wagner* v. *Baltimore*, 239 U. S. 265; *Houck* v. *Little River Drainage District*, 239 U. S. 254; *Myles Salt Co.* v. *Board of Commissioners*, 239 U. S. 478.) The court then proceeded:
>
> "The determination of the legislature as to the method of assessment is not arbitrary or erroneous on its face, nor does the testimony in this case show that it is palpably wrong. There is considerable testimony tending to show that the lands

> of appellant lying near the southern end of the district will not be relieved from overflow to the extent of other lands in other portions of the district, but it does not necessarily follow that the methods of assessment are upon the wrong basis or that they are unequal," *Oates et al* v. *Cypress Creek Drainage District*, 135 Ark. 149-155.

Both the Oates case, cited above, and the case of *Ry. V. Bridge District*, 113 Ark. 496, are authority for the proposition that increase in traffic is a sufficient benefit to railroad property; and the Oates case is also authority for the proposition that, in drainage districts, the betterment in the health of the community is a proper element for consideration. Other cases have held likewise; as, *Oliver* v. *Monona County*, 90 N. W. 510; *Veals* v. *Inhabitants of Brookline*, 174 Mass. 1; *Donnelly* v. *Decker*, (Wis.) 17 N. W. 389; *Anderson* v. *Kerns Drainage Company*, 14 Ind. 199; *R. R. Co.* v. *Ketring*, (Ind.) 23 N. E. 527; *Hager* v. *Yolo County*, 47 Cal. 222; *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701.

That the language of the 14th Amendment does not contemplate a system of delusive exactness is well settled by the decisions of this court and, as was said by the court in *L. & N. Ry. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 434:

> "It is important for this court to avoid extracting from the very general language of the 14th Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted, and which it is safe to say that no one then sup-

posed would be disturbed. * * *"

"Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected, seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be borne as one of the imperfections of human things."

We quote the opinion of this court in *Bush* v. *Branson*, 251 U. S. 189, as follows:

"On the question of benefits which would come to the railroad company from the construction of the road, the appellee receiver called four witnesses, three of them engineers and one a superintendent of the company. Two of these were familiar with the location of the road and the other two testified that they knew of its location in a general way. All four testified in general terms that the road was not and never would be of any benefit to the railroad. It is significant that no traffic man was called, and that no evidence was introduced showing the extent of business done at Alma before and after the improvement of the road."

We quote *Cass Farm Company* v. *Detroit*, 181 U S. 395-398, as follows:

"We have recently held that it was not the intention of the 14th Amendment to subvert the systems of the states pertaining to general and special taxation; that amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life and property as is afforded by the 5th Amendment against similar legislation by Congress, and that the Federal courts ought not

to interfere when what is complained of is the enforcement of the settled laws of the states applicable to all persons in like circumstances and conditions, but only when there is some abuse of law amounting to confiscation of property or deprivation of personal rights, as was instanced in the case of *Norwood* v. *Baker.*"

Tonawanda v. *Lyon*, 181 U. S. 389.
Spencer v. *Merchant*, 125 U. S. 345.

This court said in *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 155:

* * * "Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, could it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. * * * The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

In *Hager* v. *Reclamation District*, 111 U. S. 701, it was said:

> "It (Legislature) may define the apportionment of the burden, and its action cannot be assailed under the 14th Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions."

We quote *Houck* v. *Little River Drainage District*, 239 U. S. 260, as follows:

> "When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly; but even in such case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The state in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners * * *. And, as we have said, unless the exaction is a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property, it cannot be maintained that the state has exceeded its taxing power."

In a later case, this court has held that an assessment for sewerage against cemetery property was valid, although less benefit would be received by this than by other lands. The court said:

> "This court has more than once declared that it does not interfere with the taxation and assessment laws of the states, as violative of the 14th Amendment, unless the state's action has been palpably arbitrary or grossly unequal in its application to the persons concerned. In this case the assessment is a large one, but we are unable to find that the judgment sustaining it has had the effect to deprive the cemetery association of its property without due process of law, or has denied to it the equal pro-

tection of the laws," *Mount St. Mary's Cemetery Asso.* v. *Mullins*, 248 U. S. 506.

In *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, this court quoted, with approval, *Davidson* v. *New Orleans*, 96 U. S. 97, as follows:

> "Neither the coroporate agency by which the work is done, the excessive price which the statute allows therefor * * * nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred * * * are matters in which the state authorities are controlled by the Federal Constitution."

This court announced in *Webster* v. *Fargo*, 181 U. S. 395, that it was not the intention of the court in *Norwood* v. *Baker* to hold that the state taxing power could not create a taxation district and charge the cost thereof in whole or in part against the property in the district, according to valuation, superficial area, or frontage.

In the following Arkansas cases and cases from this court it has been held proper to assess as benefits a certain per cent of the assessed value for state and county purposes, to-wit:

> ***Board*** **v.** *Gas & Electric Company*, 121 Ark. **110.**
> *Ry. Co.* v. *Board of Directors*, 81 Ark. 566.
> ***Alexander*** **v.** *Board*, 97 Ark. 330.
> *Moore* v. *Board*, 98 Ark. 116.
> *Salmon* v. *Board*, 100 Ark. 369.
> *Alcorn* v. *Bliss-Cook Oak Company* (Ark.) 201 S. W. 797.
> *Dorsey Land & Lumber Company* v. *Board*, 136 Ark. 530.

Webster v. *Fargo*, 181 U. S. 394.
L. & N. Ry. Co. v. *Barber Asphalt Co.*, 197 U. S. 434.
Wagner v. *Baltimore*, 239 U. S. 265.
Houck v. *Little River Drainage District*, 259 U. S. 294.
Myles Salt Co. v. *Board*, 239 U. S. 478.
Fallbrook Irrigation District v. *Bradley*, 164 U. S. 176.
K. C. S. Ry. Co. v. *Road District*, 256 U. S. 660.

The following quotations are taken from the case of *Branson* v. *Bush*, 251 U. S. 189, to-wit:

> "The subject was carefully re-examined and the law re-stated in cases so recent as *Phillip Wagner* v. *Leser*, 239 U. S. 207; and *Houck* v. *Little River Drainage District*, 239 U. S. 254, with the result that the rule as we have stated it was approved, with the qualification, which was before implied, that the legislative determination can be assailed under the 14th Amendment only where the legislative action is 'arbitrary, wholly unwarranted' a 'flagrant abuse, and by reason of its arbitrary character, a confiscation of particular property.' * * *"
>
> "To this (natural increase in business and the discovery of a large gas field in the territory) must be added the obvious fact that anything that develops the territory which a railroad serves must necessarily be of benefit to it, and that no agency for such development equals that of good roads."

In a recent drainage district case, the Supreme Court of the United States laid down the same proposition in the following language:

> "Since *Houck* v. *Little River Drainage District*, (1915) 239 U. S. 254, the doctrine has been definitely settled, that, in the absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements and that none of such lands may escape liability solely because they will not receive direct benefits," *Miller* v. *Sacramento, etc. Drainage District*, 256 U. S. 130.

The proposition that indirect benefits will accrue to railroad property by reason of increased traffic and that such benefits are sufficient upon which to predicate assessments in improvement district matters is established by the following decisions of the Arkansas court:

St. Louis & San Francisco Railroad v. *Bridge District, supra; Oates* v. *Cypress Creek Drainage District, supra;* and the following decisions of this court:

Branson v. *Bush, supra.*
Miller v. *Drainage District, supra.*

The finding of both the lower courts, from which there has been no appeal by the railroad is that benefits would accrue to the railroad property from the improvement by reason of increased traffic. We, therefore, submit that this case necessarily falls within the enunciation of this court in *Miller* v. *Drainage District, supra*, that none of said railroad property "may escape liability simply because they will not receive direct benefits."

The language of the Supreme Court of Arkansas in *Dorsey Land & Lumber Company* v. *Garland Levee District*, 136 Ark. 524 is appropriate here and we quote as follows:

> "At any rate, the conditions are not such as to justify the court in declaring that the legislative decision involved in the creation of the district and the imposition of the burden of taxation is demonstrably erroneous. To set aside that decision of the law-makers on any other ground would constitute an invasion of the peculiar province of that branch of government."

Appellants contend that it is conclusively shown direct benefits would accrue to the railroad property by making it possible to eliminate a portion, if not all, of a long trestle in the district, thereby increasing the element of safety and likewise calling for a smaller maintenance charge. We submit that a decision to the contrary, in the language of the Arkansas court, merely constitutes "an invasion of the peculiar province of the legislative branch of government." However, since it has been established by decision of both the lower courts that the railroad would be indirectly benefited by reason of increased traffic, in view of the authorities cited, both from this and the Arkansas court, we submit that the situation in which the railroads find themselves has resulted from the application of the state law in the customary manner and on a basis commonly used in improvement districts, and that the inequality, if any, in the assessment, as stated by this court in *Bush* v. *Branson*, *supra*, "is an incidental inequality, resulting from a valid classification of railroad property for taxation purposes, which does not fall within the scope of the 14th Amendment, which 'was not intended to compel the states to adopt an iron rule of equal taxation.'"

It, therefore, is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and remanded with directions to enter judgment for the appellants.

JAMES D. HEAD and
HENRY MOORE, JR.,
Attorneys for Appellants.

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No. 303.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

WILL F. THOMAS, SHERIFF AND COLLECTOR, ET AL., APPELLANTS,

VS.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL., APPELLEES.

BRIEF OF APPELLEES.

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A. F. Smith,
James B. McDonough,
Attorneys for Appellees.

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Of Counsel.

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Argument. 7

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STATEMENT.

The Little River Drainage and Levee District of Sevier County, No. 1, Arkansas, containing 12,000 acres of fertile land subject to overflow, and traversed by 3.61 miles of railway, all built above flood level, purposes to reclaim the land by levees and drains, at an estimated cost of $70,000.00 or $75,000.00. The improvement will permit the growing of regular crops, and will double the value of the land, adding at least $300,000.00 to its present value. The railway will receive no benefit from the improvement except a possible increase of tonnage resulting from the additional crops

on the reclaimed land. By virtue of a special law the drainage district is taxing against the railway 54 per cent of the cost of this improvement, and against the 12,000 acres only 46 per cent; that is, the owners of the land whose property is doubled in value, and who get the crops, pay less than half of the cost of the improvement, and the railway company which gets to carry a part of the surplus of the crops not used or sold locally by the owner, pays more than half the cost of the improvement. In the railway company's suit to restrain the collection of this tax the District Court adjudged that the tax was unconstitutional, and the Court of Appeals in affirming that judgment held that the tax was a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law." The appellants are appealing to this court to reverse those findings and to uphold this tax. The facts out of which this controversy arises are as follows:

The railway of the Texarkana and Fort Smith Railway Company, leased to and operated by the Kansas City Southern Railway Company, runs practically north and south for about two miles along the extreme western edge of the drainage district, substantially paralleling Little River most of the way. (For convenience the two railway companies are referred to herein as the "railway company.") In times of high water Little River flows over its banks into an old channel and spreads over most or all of the 12,000 acres in the district. The railway company carries its tracks through the district on a fill or dump, the top of which is above

the level of the highest water known in the last forty years (55, 56, 133). (Figures in parenthesis refer to printed pages of the Transcript of Record.) Across the old channel of Little River the railway track is on a trestle, through which the water has run without harm to the railway company except on one occasion of an unprecedented flood when two bents of the trestle were washed out (56). If a levee were built the trestle would still be maintained by the railway company, it being considered a necessity by its engineers, at least until the levee has been demonstrated by time and actual test to be capable of withstanding similar floods (138). The closing of the old channel would require an increased opening at the bridge over the present channel, which would entail a heavy expense upon the railway company (56, 57). The building of a levee would therefore be of no direct benefit to the railway company (56, 68; 67; 70; 77), and both courts below so found (17, 161).

The drainage district was created in 1915 by a special act of the legislature (Acts of Arkansas, 1915, p. 747) and then included about 28,000 acres of land. In 1917 the legislature by another special act (Acts of Arkansas, 1917, p. 348) reduced the area of the district to about 12,000 acres. Section 3 of the act of 1915 imposes upon the board of directors of the drainage district the duty of constructing ditches, drains, sluiceways, flood gates and other construction works. For the purpose of paying for such improvements section 4 of the act empowers the board of directors to assess and levy

annually a tax upon the valuation, as it appears each year on the assessment books of Sevier County, Arkansas, of all lands and tramroads, natural gas and pipe lines, telephone and telegraph lines and the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors, not to exceed in any one year the sum of 6 per cent of the assessed valuation of the said property within the district (which tax, incidentally is four times the combined tax rate collectible for all state and county purposes, Sections 8 and 9, Article 16, Arkansas Constitution). There was no finding in the law of 1915 or in the law of 1917 that the property of the railway company (or any other property) would be benefited by this improvement.

The preliminary estimate of the cost of the improvement was $70,000.00 or $75,000.00 (105, 131), but the act places no limit upon how much may be spent for the improvement. Provision is made therein for $150,000.00 of bonds, to bear interest at not exceeding 6 per cent per annum, the time of maturity to be fixed by the board of directors. The actual cost of improvements of this kind ordinarily exceeds the estimated cost, but if the work could be done for $70,000.00 and were paid for with 6 per cent bonds running for twenty years the total cost of the improvement, principal and interest would be $154,000.00, exclusive of the expenses of the district and the cost of collecting the taxes.

In 1917 the board of directors of the district levied a tax of 6 per cent upon the valuation of all property

in the district, and the railway company instituted this proceeding to enjoin the enforcement of the tax against it on the ground that the tax was unconstitutional and illegal. On the trial it was proved by witnesses testifying for the drainage district that the 12,000 acres of land in the district other than railroad property was worth from $140,400.00 to $300,000.00, and appellants concede in their brief (p. 25) that the improvement would add at least $300,000.00 to that value. The tax of 6 per cent upon all of the property in the district other than railroad property was $3,151.52 (24), therefore the assessed value of the 12,000 acres of land was $52,525.33, or about 36 per cent of its lowest estimated real value. The tax upon the property of the railway company was $4,190.00 (23), which would be 6 per cent of $69,910.00, apportioned as follows: 2.1 miles main track at $27,000.00 per mile $56,000.00, .62 mile Neal Springs detour at $17,000.00 per mile $10,540.00, .89 mile side track at $3,000.00, $2,670.00; total $69,910.00 (6). The inventory value of the property of the railway in the district as found by the Interstate Commerce Commission, plus additions and betterments from the Commission's valuation date, amounts to $77,731. The property of the railway company in the district was therefore assessed at a great deal more than 50 per cent of its actual value.

The District Court found that the tax was unconstitutional. In affirming that decision the Court of Appeals thus summed up the facts:

"Examining the evidence, the result is as follows: The district is purely rural. It comprises (as amended by the Act of 1917) approximately 12,000 acres. About 10 per centum of this acreage is now cultivated; the balance being rich wild land, untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from $8.00 to $40 per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle, and is above overflow. The only benefit to appellees from this improvement would be through increased traffic, because of any increased shipments resulting from general cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000 to $75,000. The property of appellees would pay about half of this cost.

"The showing thus made reveals this result, to-wit: That the cost of an expensive improvement, which will increase the value of about 12,000 acres of land at least a quarter of a million dollars, is to be half paid by appellees, which have within a rural locality 3.61 miles of track, and which are benefited by a problematical increase of traffic through the greater production from the above benefited acreage." (*Thomas v. The Kansas City Southern Ry. Co.*, 277 Fed. 708, 712, 713.)

ARGUMENT.

The tax whose collection the appellees are trying to prevent by this suit is unconstitutional and illegal for the reasons hereinafter stated.

I.

The tax in question is palpably discriminatory and arbitrary because of the inequality of assessment of benefits, and it is therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

The general theory upon which any special assessment against property is upheld is "grounded upon the idea that the property assessed has been actually benefited by a public improvement and should respond in proportion to the benefit so received" (277 Fed. 708, 712). The theory of the assessment against the property of the railway company in the drainage district must be this: The land in the district may be reclaimed and cultivated, and then it may produce more crops than at the present time. Out of this increase in the crops the owner will reserve a part for his own use, and may sell the surplus, some locally and some abroad. Of this sold abroad some may move over the Jefferson Highway bordering the district, to some other railway, and some of it may be carried by the appellee railway company, for which carriage it will receive its freight charges. From these charges it must pay the cost of carriage, and the balance will be "profit," after other

charges are deducted therefrom. The "profit" derived from the carriage of freight outside of the district will belong to such outside part, for no benefit can be assessed against property outside of the improvement district (See *Union Tank Line* v. *Wright*, 249 U. S. 275, 39 S. C. R. 276; *Fargo* v. *Hart*, 193 U. S. 490, 24 S. C. R. 498), so the proportionate part of the carriers' profit to be credited to the district in this case would be the proportion of miles in the district to the total miles which the shipment would travel over the line of the railway company. Can anyone seriously contend that the mere possibility of receiving these attenuated profits could give to the railway property in the district a greater increase in its value than the increase in value of all of the land in the district directly and immediately benefited by the improvement?

Appellants contend that the railway company will receive a direct benefit from the construction of the levee because the building of the levee would enable it to abandon one of its present trestles; but the weight of the evidence on that issue was against the appellants, and both courts below expressly found that the improvement would confer no direct benefit upon the railway.

The appellants further contend that as the levees and drains are constructed the property in the district will increase in value and will bear a heavier proportion of the cost of the construction of the levee. We are dealing here with actual conditions and not with improbable prophecies. The unlikelihood of the local authorities undertaking to bear their proper proportion of

the cost of the improvement is demonstrated by the history of what has already been done. It seems that the legislature of Arkansas has the right—and frequently enjoys it—of passing local or special acts (Arkansas Constitution, Article 5, Section 26), and the only condition precedent to the passage of such a local or special act is the giving of a 30 days notice, accomplished by posting handbills in five public places in the locality where the matter or thing to be affected shall be situated, or by publication in some newspaper of general circulation in such locality (Crawford & Moses Digest of the Arkansas Statutes, 1921, Sections 4966, 4967). Although the railway company was evidently intended by the framers of this local statute to contribute a large part of the cost of this enterprise, it was neither consulted or given actual notice of the pendency of the bill (23, 37). The drainage district lies in close proximity to the thriving town of Horatio, and most of the owners of the land in the district live in that town. Horatio will be directly benefited by the development of the land in the drainage district (96, 97), but Horatio is excluded from the district and pays no part of the cost of the improvement. The law was so drafted that although the railway company is a heavy contributor to the cost of the improvement it can have no voice in its management. The property in the district other than railway property is now being greatly under-assessed, and the property of the railway company is being greatly over-assessed. In the light of this history there is little pros-

pect of any substantial increase in the contributions of the owners of the land in the district to the cost of the improvement. And if they did pay a larger part in the future, the railway company could never have restored to it the payments it must make pending that prophesied millenium.

Appellants further contend that the benefits which the property in the district will receive from the improvement have been found by the legislature and therefore the assessment should be maintained, even though it may appear to be exorbitant; and authorities are cited which appellants claim support their contention. But an examination of those authorities will show that in most instances the tax in question was levied under a general statute reasonable in its ordinary application, but creating a hardship in some particular instance. In a few of the cases cited the tax was levied under a special law, but in each of those special laws there was a provision for a hearing at which the property owner was given an opportunity to procure a reduction of his assessment in case it was unjust. In every case cited there is a reservation, either express or implied, that a tax which is palpably discriminatory and shows a clear abuse of the taxing power is unconstitutional and void. It must be borne in mind that the act in question in this case is a special act applicable to a district comprising only 12,000 acres, with only one railroad in it (85, 95), and it is to be presumed that the legislature knew of the assessed valuation of the land and of the railroad in the district, and that it was intended to impose upon the railway com-

pany the burden of paying for a large part of the cost of the improvement. The following authorities illustrate the rule that state legislatures are still subject to the Federal constitution:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to plaintiffs aggrieved" (*Hancock* v. *Muskogee*, 250 U. S. 454, 457, 458, 63 L. Ed. 1081).

"The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the fourteenth amendment a system of delusive exactness and merely logical form. But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set on the height of buildings without compensation, but to make that limit 5 feet would require compensation and a taking by eminent domain" (*Martin* v. *District of Columbia*, 205 U. S. 135, 27 S. C. R. 440).

"If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. * * * The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing the local tax in grossly unequal proportions, not because of special conditions applicable to the parcels taxed, but in blind obedience to a rule that requires the result, and it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts" (*Gast etc. Co. v. Schneider etc. Co.*, 240 U. S. 55, 36 S. C. R. 254).

In disposing of the case at bar the Court of Appeals thus stated the law governing a case of this kind:

"While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such 'benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results.' *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, decided by the Supreme Court of the United States, June 6, 1921. Such

assessment cannot stand, if it is 'palpably arbitrary,' or if it is palpably discriminatory. *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra; Houck* v. *Little River Drainage Dist.*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Cast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523, 526, 1239). Therefore the test of law to be applied to the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory."

"The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the legislature here took them to be identical carries no more force than if some other basis of value had been selected. * * * The following statement in the opinion in *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra*, seems directly applicable to these facts:

"'It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad

property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.'

"The facts of this case clearly reveal an instance of a 'discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law,' such as is condemned in the cases cited above." (*Thomas* v. *K. C. So. Ry. Co.*, *supra.*)

II.

The tax in question is discriminatory because the property in the district other than railway property is generally and systematically under-valued as compared with the valuation of the railway property, and therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

Two men called as witnesses on behalf of the drainage district testified as to the value of the land in the district. E. W. Beeson, a director of the drainage district (87) owns 400 acres of land in the district, 130 acres being in cultivation at the present time. He testified that the cultivated land was worth $50.00 an acre (86); that the land in the district was rich, and if drained and protected, from 75 to 90 per cent of it would be as good as that now under cultivation (82, 85). Mr. Beeson further testified that the land "in the woods" was worth from $8.00 to $12.00 an acre. Joe Graer, a farmer owning 500 acres in the district, testified that the land in cultivation is worth $100.00 an acre

(100) and the uncultivated land is worth from $13.00 to $40.00 an acre (100). Both Mr. Beeson (86) and Mr. Graer (100) testified that the improvement of the district would double the value of the land. About 10 per cent of the land in the district is in cultivation (101). Giving the improved property the minimum value of $50.00 stated by Mr. Beeson, the 1,200 acres of improved land would be worth $60,000.00. Giving to all of the remaining 10,800 acres of unimproved land the minimum value of $8.00 given by the most conservative of the witnesses, the unimproved land would be worth $86,400.00. The total land in the district on that conservative valuation would then be worth $146,400. There was levied against this land an assessment of $3151.62, which would be 6 per cent of $52,525.33, which is about 36 per cent of the value of the land in the district as stated by the witnesses for the district. The value of the property of the railway company in the district as fixed by the Interstate Commerce Commission, with additions and betterments from the Commission's valuation date, is $77,730.00. Its property in the district was assessed by the Arkansas Tax Commission at $69,910.00. Property in Arkansas is assessed on a basis of 50 per cent of its actual value (31), so we have as a result a finding by the Arkansas Tax Commission that the 100 per cent value of the railroad property in the district is $139,820.00, or $62,090.00 more than its real value as found by the Interstate Commerce Commission. It follows therefore that the property of the railway company in the district is either assessed at a

roads or railways of each company or corporation having existence under the laws of this state and incorporated in whole or in part therein and run through or in" Arkansas. Section 9975 provides that "the franchise (other than the right to be a corporation) of all railroads are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers in assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible." These statutes prove that railroad tracks and franchise and intangible values are separate items. The Tax Commission in making up its report of the assessment of railroad property makes a specific finding as to the value of buildings, materials and stores, rolling stock and side tracks, and unites under the heading of railroad tracks all of the other values of a railway, including the franchise value (29, 30). It is true that this court in *Branson* v. *Bush*, 251 U. S. 189, has held that in determining the value of a railway against which an assessment may be made the franchise value may be included. But the law in that case authorized a tax against "railroads" (Special and Private Acts of Arkansas, 1911, pp. 642, 645), and not merely against railroad *tracks*. The case at bar was tried by the appellants on the theory that the law in question did not authorize a tax against the franchise or intangible value of the railway companies. In their answer they say that they

"deny that there has been assessed against the property of the plaintiff any taxes whatever against their intangible property or personal property" (12). On the trial of the case their counsel made the following statement: "Now, if Your Honor please, I object to that, if he means to imply by that that we have assessed anything against the franchise because that is not the best evidence. In fact we have not. We have only assessed against the track itself" (28). In their assignment of errors (19, 20) the appellants complained of the admission of proof that an intangible or franchise value was included in the property assessed by the district. The law under which the assessment in question is made having limited the property subject to taxation to railroad tracks, and appellants having tried the case on the theory that the tax was not assessed against any other railroad property, they ought not be heard at this time to say that the statute in question authorized the inclusion of an intangible or franchise value in the railroad property subject to assessment by the drainage district.

V.

The boundaries of the district are so indefinitely described as to make it impossible to ascertain what lands are included in the district and what lands are excluded therefrom.

The northern boundary of the district is described as "the line of the hills which is entirely above overflow." The evidence showed that there was no such

definite line (41, *et seq.*). An act indefinitely describing a district is invalid (*Morgan Engineering Co. v. Cache River Drainage District*, 122 Ark. 491).

VI.

The act unlawfully provides for the payment of the debts of another corporation by special assessment against property in the district.

Section 30 of the Act of 1915 provides that the district thereby improved "shall assume and be liable for all indebtedness and contracts of whatsoever kind legally incurred of the said Little River Drainage District organized as aforesaid by the said County Court." The railway company cannot be chargeable with the debts of a corporation of which debts it has no knowledge and for which it has received no benefit.

The judgments of the courts below should be sustained.

Respectfully submitted,

F. H. Moore,
A. F. Smith,
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S. W. Moore,
Of Counsel.

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STATEMENT.

The Little River Drainage and Levee District of Sevier County, No. 1, Arkansas, containing 12,000 acres of fertile land subject to overflow, and traversed by 3.61 miles of railway, all built above flood level, purposes to reclaim the land by levees and drains, at an estimated cost of $70,000.00 or $75,000.00. The improvement will permit the growing of regular crops, and will double the value of the land, adding at least $300,000.00 to its present value. The railway will receive no benefit from the improvement except a possible increase of tonnage resulting from the additional crops

on the reclaimed land. By virtue of a special law the drainage district is taxing against the railways 57 per cent of the cost of this improvement, and against the 12,000 acres only 43 per cent; that is, the owners of the land whose property is doubled in value, and who get the crops, pay less than half of the cost of the improvement, and the railway company which may get to carry part of the surplus of the crops not used or sold locally by the owner, pays more than half the cost of the improvement. In the railway company's suit to restrain the collection of this tax the District Court adjudged that the tax was unconstitutional, and the Court of Appeals in affirming that judgment held that the tax was a "discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law." The appellants are appealing to this court to reverse those findings and to uphold this tax. The facts out of which this controversy arises are as follows:

The railway of the Texarkana and Fort Smith Railway Company, leased to and operated by the Kansas City Southern Railway Company, runs practically north and south for about two miles along the extreme western edge of the drainage district, substantially paralleling Little River most of the way. (For convenience the two railway companies are referred to herein as the "railway company.") In times of high water Little River flows over its banks and spreads over a part or all of the 12,000 acres in the district. Except for one trestle, the railway company carries its tracks through the district on a fill or dump, the top of

which is above the level of the highest water known in the last forty years (55, 56, 133). (Figures in parenthesis refer to printed pages of the Transcript of Record.) Across 510 feet of the district the railway track is on a trestle, through which the water has run without harm to the railway company except on one occasion of an unprecedented flood when two bents of the trestle were washed out (56). If a levee were built the trestle would still be maintained by the railway company, it being considered a necessity by its engineers, at least until the levee has been demonstrated by time and actual test to be capable of withstanding similar floods (138). The closing of the old channel would require an increased opening at the bridge over the present channel, which would entail a heavy expense upon the railway company (56, 57). The building of a levee would therefore be of no direct benefit to the railway company (56, 68; 67; 70; 77), and both courts below so found (17, 161).

The drainage district was created in 1915 by a special act of the legislature (Acts of Arkansas, 1915, p 747) and then included about 28,000 acres of land. In 1917 the legislature by another special act (Acts of Arkansas, 1917, p. 348) reduced the area of the district to about 12,000 acres. Section 3 of the act of 1915 imposes upon the board of directors of the drainage district the duty of constructing ditches, drains, sluiceways, flood gates and other construction works. For the purpose of paying for such improvements section 4 of the act empowers the board of directors to assess and levy

annually a tax upon the valuation, as it appears each year on the assessment books of Sevier County, Arkansas, of all lands and tramroads, natural gas and pipe lines, telephone and telegraph lines and the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors, not to exceed in any one year the sum of 6 per cent of the assessed valuation of the said property within the district (which tax, incidentally is four times the combined tax rate which can be levied for all state and county purposes. Sections 8 and 9, Article 16, Arkansas Constitution).

The preliminary estimate of the cost of the improvement was $70,000.00 or $75,000.00 (105, 131), but the act places no limit upon how much may be spent for the improvement. Provision is made therein for $150,000.00 of bonds, to bear interest at not exceeding 6 per cent per annum, the time of maturity to be fixed by the board of directors. The actual cost of improvements of this kind ordinarily exceeds the estimated cost, but if the work could be done for $70,000.00 and were paid for with 6 per cent bonds running for twenty years the total cost of the improvement, principal and interest would be $154,000.00, exclusive of the expenses of the district and the cost of collecting the taxes.

In 1917 the board of directors of the district levied a tax of 6 per cent upon the valuation of all property in the district, and the railway company instituted this proceeding to enjoin the enforcement of the tax against it on the ground that the tax was unconstitutional and

illegal. On the trial it was proved by witnesses testifying for the drainage district that the 12,000 acres of land in the district other than railroad property was worth from $146,400.00 to $300,000.00, and appellants concede in their brief (p. 25) that the improvement would add at least $300,000.00 to that value. The tax of 6 per cent upon all of the property in the district other than railroad property was $3,151.52 (24), therefore the assessed value of the 12,000 acres of land was $52,525.33, or about 36 per cent of its lowest estimated real value. The tax upon the property of the railway company was $4,190.00 (23), which would be 6 per cent of $69,910.00, apportioned as follows: 2.1 miles main track at $27,000.00 per mile $56,000.00, .62 mile Neal Springs detour at $17,000.00 per mile $10,540.00, .89 mile side track at $3,000.00, $2,670.00; total $69,-910.00 (6). The inventory value of the property of the railway in the district as found by the Interstate Commerce Commission, plus additions and betterments from the Commission's valuation date, amounts to $77,-731. The property of the railway company in the district was therefore assessed at a great deal more than 50 per cent of its actual value.

The District Court found that the tax was unconstitutional. In affirming that decision the Court of Appeals thus summed up the facts:

> "Examining the evidence, the result is as follows: The district is purely rural. It comprises (as amended by the Act of 1917) approximately 12,000 acres. About 10 per centum of this acreage

is now cultivated; the balance being rich wild land, untillable because of marshy or overflow conditions. The improvements contemplated would render practically all of this wild land tillable. The value of all lands in the district (now worth from $8.00 to $40 per acre) would be more than doubled in value by the improvements. Appellees have, within the proposed district, 2.72 miles of main line track and .89 miles of side track. It is all located along the extreme western and northwestern boundaries of the district. The acreage of this railroad property is 40.43 acres. It is, for the most part, constructed upon high fills and a trestle, and is above overflow. The only benefit to appellees from this improvement would be through increased traffic, because of any increased shipments resulting from general cultivation of the land within the district because of the improvement. The basis taken as the benefits to the various pieces of land and the property of the appellees was the valuation for general taxation purposes. This value as to appellees' property included intangibles. The contemplated improvement would cost from $70,000 to $75,000. The property of appellees would pay about half of this cost.

"The showing thus made reveals this result, to-wit: That the cost of an expensive improvement, which will increase the value of about 12,000 acres of land at least a quarter of a million dollars, is to be half paid by appellees, which have within a rural locality 3.61 miles of track, and which are benefited by a problematical increase of traffic through the greater production from the above benefited acreage." (*Thomas v. The Kansas City Southern Ry. Co.*, 277 Fed. 708, 712, 713.)

ARGUMENT.

The tax whose collection the appellees are trying to prevent by this suit is unconstitutional and illegal for the reasons hereinafter stated.

I.

The tax in question is palpably discriminatory and arbitrary because of the inequality of assessment of benefits, and it is therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

The general theory upon which any special assessment against property is upheld is "grounded upon the idea that the property assessed has been actually benefited by a public improvement and should respond in proportion to the benefit so received" (277 Fed. 708, 712). Appellants contend that the railway company will receive a direct benefit from the construction of the levee because the building of the levee would enable it to abandon one of its present trestles; but the weight of the evidence on that issue was against the appellants, and both courts below expressly found that the improvement would confer no direct benefit upon the railway (17, 161). Therefore, the theory of the assessment against the property of the railway company in the drainage district must be this: The land in the district may be reclaimed and cultivated, and then it may produce more crops than at the present time. Out of this increase in the crops the owner will reserve a part for his own use,

and may sell the surplus, some locally and some abroad. Of that sold abroad some may move over the Jefferson Highway bordering the district, to some other railway, and some of it may be carried by the appellee railway company, for which carriage it will receive its freight charges. There may also result some increase in inbound traffic. Out of this additional revenue the railway company must pay the cost of carriage, and the balance will be "profit," after other charges are deducted therefrom. The increase in value of the railway company's property in the district due to the possibility of receiving these profits is the basis for the tax.

It is fundamental that no benefit can be assessed against property outside of the drainage district. "To do so under any formula," said this Court in *Union Tank Line* v. *Wright*, 249 U. S. 274, "would violate the due process clause of the 14th amendment." The same principle finds ample illustration in *Fargo* v. *Hart*, 193 U. S. 490. Under the express terms of Section 4 of the Act of 1915, the assessment of benefits is limited to the property *in the district*. No doubt the property of other persons outside of the district may be benefited, but no assessment is to be made against it. As an illustration, property in Horatio will receive benefits as great, if not greater, than those received by the railway company, but that property is outside the limits of the improvement district, and no assessments are made against it.

The question, therefore, is, will there be any enhancement in value of the railroad's property *in the dis-*

trict, caused by the proposed improvements, sufficient to justify the assessment made? The enhancement in value within the district must equal the amount of the assessment, otherwise the company's property is taken for public use without compensation.

The effect of increased traffic, due to the construction of these improvements, cannot, in the nature of things, be limited to the railroad property within the district. The segment of road in the district is "a part of the railroad unit" (*Branson* v. *Bush*, 251 U. S. 189). The value of the property of the railroad necessarily rises and falls as a unit. As this court said in *Branson* v. *Bush*:

> "It is practically impossible—at least in respect to railroad property—to divide its value, and determine how much is caused by one use to which it is put and how much by another."

To take an extreme illustration, assume the discovery of oil, in large quantity, adjacent to the track of the railroad in Sevier County, Arkansas, and the sudden and extraordinary increase in traffic that would be occasioned thereby. This would not increase the value of the railroad adjacent to the oil well, over and above any other piece of track in the railroad system. The earnings from this traffic would be enjoyed by the railroad as a unit, and whatever increase in value might be occasioned thereby would be spread over all the mileage under one operation and control.

This court said in the *State Railroad Tax* case, 92 U. S. 579, 608, quoted in *Branson* v. *Bush*, *supra*,

> "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road and apportion the value within the county by its relative length to the whole."

"Every mile," said this court in *Fargo v. Hart, supra*, "is a necessary condition of the use of the rest of the line beyond, and therefore a reflex condition of the value of the line behind it."

The assessment of railroad property for state and county purposes by the State of Arkansas recognizes that the value of the entire railroad is a unit, and it assesses within the state and within each political subdivision, that portion of the value which the mileage bears to the entire mileage. In 1911 (Acts, Arkansas, 1911, page 233), the state enacted a law for the assessment and taxation of all property, tangible and intangible, of railway companies. In Section 1, it is provided that the Tax Commission

> "shall ascertain the value of all property, tangible and intangible, including the franchises (except the right to be a corporation), railroad tracks, rolling stock," etc.

Section 2 provides:

> "The franchises (other than the right to be a corporation) of all railroads, express, telegraph and telephone companies, are declared to be property for the purpose of taxation and the value of such franchises shall be considered by the assessing officers when assessing the property of such corporations. In valuing for assessment purposes the property of such corporations, the Arkansas Tax Commission shall determine the total value of the

entire property of the corporation, tangible and intangible."

The assessed valuation of $27,000 per mile of main line in this case, represents the Arkansas mileage proportion of the entire value of the system. "There are," as this Court said in *Louisville & Nashville R. R. Co.* v. *Greene*, 244 U. S. 522, 540, "two recognized methods, known as the stock-and-bond plan and the capitalization-of-income plan" of determining the value of railway property as an entirety. After this value has been ascertained, it becomes a simple problem to assign to the State of Arkansas and to its several subdivisions their proportion of value on a mileage basis.

Assuming an increase in tonnage by reason of the proposed improvements, and that such traffic will be profitable, and that the result will be to increase the value of the entire railroad property, 800 miles long, and bearing in mind that only the enhancement in value within the district itself can be assessed with benefits, we proceed to inquire how much increase in traffic the railway company will have to realize, from that source, in order to justify the proposed assessment.

Let us assume, for purposes of illustration, that the railway company will enjoy an increased annual gross revenue, due entirely to the construction of the proposed improvements of $1000 per year, and that the operating ratio is 75 per cent., *i. e.*, of each dollar of gross revenue, seventy-five cents represents expenses and twenty-five cents represents net revenue or profits. There would result a net revenue, or profit, of 25 per cent. of this

gross revenue, amounting to $250 per year. This net revenue, or profit, would necessarily be spread over the entire mileage of 800 miles. The segment within the district, 2.1 miles of main line, is .26 per cent of the entire mileage. The amount of net earnings, or profits, assignable to the 2.1 miles within the district (.26 per cent of $250), would be $ .65. If we capitalize, at 6 per cent, these net earnings, or profits, amounting to $.65, in order to ascertain the value which they may be said to represent, the result is $10.80. This would represent the increased value of the 2.1 miles of main line of the railroad property within the district, arising from an annual increase of $1000 in freight and passenger gross revenue.

If we assume that the annual gross revenue from traffic in the district is increased tenfold over the sum used in the foregoing illustration, the result would be an enhancement in value of the railroad property within the district of $108.

If we assume an increased annual gross revenue of $100,000 due to the improvement (which, of course, is so large as to be absurd), this would represent an enhancement in value of the railroad property within the district of $1080, which is slightly over *26 per cent* of $4190—the amount of the tax for just one year.

We earnestly contend that, under these circumstances, it is nothing short of a travesty to sustain an assessment of $4190 per year against the property of the railway company. It is fully recognized that in making local assessments certain inequalities will necessarily

arise, due to the very nature of the proceeding, which it is not the policy of the law to undertake to rectify. But this is not an inequality of that character. It is a gross, glaring injustice, which comes clearly within the rule of *Norwood* v. *Baker*, 172 U. S. 269; *Myles Salt Co.* v. *Iberia Drainage Dist.*, 239 U. S. 478, and *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U. S. 55. It is, to quote the language of this court in *Branson* v. *Bush*, *supra*:

> "a flagrant abuse, and by reason of its arbitrary character, the mere confiscation of particular property."

Can anyone seriously contend that the mere possibility of receiving the attenuated profits that might arise from the proposed improvements would justify the imposition upon the railway company of a tax greater than that imposed upon all of the 12,000 acres of land in the district? We believe this court has answered this question in *Kansas City Southern Ry. Co.* v. *Road Imp. Dist.*, 256 U. S. 658.

The appellants further contend that as the levees and drains are constructed the property in the district will increase in value and will bear a heavier proportion of the cost of the construction of the levee. We are dealing here with the existence of actual facts are not with a prophecy of improbable charges. The unlikelihood of the local authorities undertaking to bear their proper proportion of the cost of the improvement is demonstrated by the history of what has already been done. It seems that the legislature of Arkansas has the right—and fre-

quently enjoys it—of passing local or special acts (Arkansas Constitution, Article 5, Section 26), and the only condition precedent to the passage of such a local or special act is the giving of a 30 days notice, accomplished by posting handbills in five public places in the locality where the matter or thing to be affected shall be situated, or by publication in some newspaper of general circulation in such locality (Crawford & Moses Digest of the Arkansas Statutes, 1921, Sections 4966, 4967). Although the railway company was evidently intended by the framers of this local statute to contribute a large part of the cost of this enterprise, it was neither consulted or given actual notice of the pendency of the bill (23, 37). The drainage district lies in close proximity to the thriving town of Horatio, and most of the owners of the land in the district live in that town. Horatio will be directly benefited by the development of the land in the drainage district (96, 97), but Horatio is excluded from the district and pays no part of the cost of the improvement. The law was so drafted that although the railway company is a heavy contributor to the cost of the improvement it can have no voice in its management. The property in the district other than railway property is now being greatly under-assessed, and the property of the railway company is being greatly overassessed. In the light of this history there is little prospect of any substantial increase in the contributions of the owners of the land in the district to the cost of the improvement. And if they did pay a larger part in the future, the railway company could never have restored

to it the payments it must make pending that prophesied millenium.

Appellants further contend that the benefits which the property in the district will receive from the improvement have been found by the legislature and therefore the assessment should be maintained, even though it may appear to be exorbitant; and authorities are cited which appellants claim support their contention. But an examination of those authorities will show that in most instances the tax in question was levied under a general statute reasonable in its ordinary application, but creating a hardship in some particular instance. In a few of the cases cited the tax was levied under a special law, but in each of those special laws there was a provision for a hearing at which the property owner was given an opportunity to procure a reduction of his assessment in case it was unjust. In every case cited there is a reservation, either express or implied, that a tax which is palpably discriminatory and shows a clear abuse of the taxing power is unconstitutional and void. It must be borne in mind that the act in question in this case is a special act applicable to a district comprising only 12,000 acres, with only one railroad in it (85, 95), and it is to be presumed that the legislature knew of the assessed valuation of the land and of the railroad in the district, and that it was intended to impose upon the railway company the burden of paying for a large part of the cost of the improvement. The following authorities illustrate the rule that state legislatures are still subject to the Federal constitution:

"We do not mean to say that if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to plaintiffs aggrieved" (*Hancock* v. *Muskogee*, 250 U. S. 454, 457, 458, 63 L. Ed. 1081).

"The assessment in question there was an assessment for grading and paving, and it was pointed out that a legislature would be warranted in assuming that grading and paving streets in a good sized city commonly would benefit adjoining land more than it would cost. The chance of the cost being greater than the benefit is slight, and the excess, if any, would be small. These and other considerations were thought to outweigh a merely logical or mathematical possibility on the other side, and to warrant sustaining an old and familiar method of taxation. It was emphasized that there should not be extracted from the very general language of the fourteenth amendment a system of delusive exactness and merely logical form. But when the chance of the cost exceeding the benefit grows large, and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set on the height of buildings without compensation, but to make that limit 5 feet would require compensation and a taking by eminent domain" (*Martin* v. *District of Columbia*, 205 U. S. 135, 27 S. C. R. 440).

"If the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed

in fact. * * * The defendant's case is not an incidental result of a rule that as a whole and on the average may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing the local tax in grossly unequal proportions, not because of special conditions applicable to the parcels taxed, but in blind obedience to a rule that requires the result, and it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the state courts" (*Gast etc. Co. v. Schneider etc. Co.*, 240 U. S. 55, 36 S. C. R. 254).

In disposing of the case at bar the Court of Appeals thus stated the law governing a case of this kind:

"While the Legislature has a wide discretion in declaring both the existence of benefits and the amount thereof, yet that discretion is not limitless nor irrestrainable by the courts. Such 'benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results.' *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, decided by the Supreme Court of the United States, June 6, 1921. Such assessment cannot stand, if it is 'palpably arbitrary,' or if it is palpably discriminatory. *Kansas City Southern Ry. Co. v. Road Improvement Dist.*, *supra*; *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 262, 36 Sup. Ct. 58, 60 L. Ed. 266; *Gast Realty Co. v. Schneider Granite Co.*, 240 U.

S. 55, 36 Sup. Ct. 254, 255, 400, 60 L. Ed. 523, 526, 1239). Therefore the test of law to be applied to the facts of this case is whether or not the facts show this assessment to be palpably arbitrary and discriminatory."

"The basis of valuation here employed for benefits is the valuation of all property within the district for general taxation. General taxation and assessment for special benefits are essentially different in their basic characteristics and their legal theories. One is grounded upon the idea that all property should bear a proportion, based upon value, of the burden of general taxation; the other is grounded upon the idea that property actually benefited by a public improvement should respond in proportion to the benefit so received. Obviously, any connection between the value of a given piece of property for general taxation and its value for benefit assessment taxation is purely accidental. Therefore the circumstance that the legislature here took them to be identical carries no more force than if some other basis of value had been selected. * * * The following statement in the opinion in *Kansas City Southern Ry. Co.* v. *Road Improvement Dist., supra*, seems directly applicable to these facts:

"'It is doubtful whether any very substantial appreciation in value of the railroad property within the district will result from the improvements; and very clearly it cannot be taxed upon some fanciful view of future earnings and distributed values, while all other property is assessed solely according to area and position. Railroad property may not be burdened for local improvements upon a basis so wholly different from that used for ascertaining the contribution demanded of individual owners as necessarily to produce manifest inequality. Equal protection of the law must be extended to all.'

"The facts of this case clearly reveal an instance of a 'discrimination so palpable and arbitrary as to amount to a denial of the equal protection of the law,' such as is condemned in the cases cited above." (*Thomas v. K. C. So. Ry. Co.*, *supra*.)

II.

The tax in question is discriminatory because the property in the district other than railway property is generally and systematically under-valued as compared with the valuation of the railway property, and therefore unconstitutional under Section 1 of the 14th Amendment of the Federal Constitution.

Two men called as witnesses on behalf of the drainage district testified as to the value of the land in the district. E. W. Beeson, a director of the drainage district (87) owns 490 acres of land in the district, 130 acres being in cultivation at the present time. He testified that the cultivated land was worth $50.00 an acre (86); that the land in the district was rich, and if drained and protected, from 75 to 90 per cent of it would be as good as that now under cultivation (82, 85). Mr. Beeson further testified that the land "in the woods" was worth from $8.00 to $12.00 an acre. Joe Graer, a farmer owning 500 acres in the district, testified that the land in cultivation is worth $100.00 an acre (100) and the uncultivated land is worth from $13.00 to $40.00 an acre (100). Both Mr. Beeson (86) and Mr. Graer (100) testified that the improvement of the district would double the value of the land. About 10

per cent of the land in the district is in cultivation (101). Giving the improved property the minimum value of $50.00 stated by Mr. Beeson, the 1200 acres of improved land would be worth $60,000.00. Giving to all of the remaining 10,800 acres of unimproved land the minimum value of $8.00 given by the most conservative of the witnesses, the unimproved land would be worth $86,400.00. The total land in the district on that conservative valuation would then be worth $146,400. There was levied against this land an assessment of $3151.62, which would be 6 per cent of $52,525.33, which is about 36 per cent of the value of the land in the district as stated by the witnesses for the district. The value of the property of the railway company in the district as fixed by the Interstate Commerce Commission, with additions and betterments from the Commission's valuation date, is $77,730.00. Its property in the district was assessed by the Arkansas Tax Commission at $69,910.00. Property in Arkansas is assessed on a basis of 50 per cent of its actual value (31), so we have as a result a finding by the Arkansas Tax Commission that the 100 per cent value of the railroad property in the district is $139,820.00, or $62,090.00 more than its real value as found by the Interstate Commerce Commission. It follows therefore that the property of the railway company in the district is either assessed at a great deal more than 50 per cent of its actual value or there is added as franchise or intangible value the enormous sum of $62,090.00 for that part of the railway in the district (31). On either hypothesis the ratio of as-

sessed value to actual value of the railway property and the ratio of the assessed value of the other property in the district to its real value do not even approach equality. A tax based on such an unequal method of assessment is invalid. (*Sioux City etc. Co. v. Dakota County, Nebr.*, 43 S. C. R. 190.)

III.

The tax in question is assessed upon the value of all of the property of the railway company in the district, including the intangible or franchise value of that part in the district, when under the provisions of the act such intangible or franchise value is not subject to assessment.

Both courts below found that the value of the railway company's property upon which the tax in question was levied, included the franchise or intangible value (17, 161). Section 4 of the Act of 1915 confers upon the directors of the drainage district the power to assess and levy annually a tax upon the valuation of certain property, including "the *railroad tracks* of companies in said district, as appraised by the Board of Railroad Commissioners or their successors." Section 11 of Article 16 of the Constitution of Arkansas specifically provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall *state distinctly* the object of the same." The legislature having stated distinctly that railroad *tracks* are the only parts of the property of the railroads subject to taxation in the district, the board of directors of the drainage district had no authority to levy a tax against all

of the property of the railway company, including the franchise value of the railway. Acts of Arkansas, 1911, p. 233, now Section 9974, Crawford & Moses Digest of Arkansas Statutes, 1921, provides that the State Tax Commission in assessing the property of the railroad companies shall "ascertain the value of all property, tangible and intangible, including the franchise (except the right to be a corporation), railroad tracks, rolling stock, water and wood stations, passenger and freight depots, office furniture and other property, real and personal, owned by each of the railroads or railways of each company or corporation having existence under the laws of this state and incorporated in whole or in part therein and run through or in" Arkansas. Section 9975 provides that "the franchise (other than the right to be a corporation) of all railroads are declared to be property for the purpose of taxation, and the value of such franchises shall be considered by the assessing officers in assessing the property of such corporations. In valuing for assessment purposes the property of such corporations the Arkansas Tax Commission shall determine the total value of the entire property of the corporation, tangible and intangible." These statutes prove that railroad tracks and franchise and intangible values are separate items. The Tax Commission in making up its report of the assessment of railroad property makes a specific finding as to the value of buildings, materials and stores, rolling stock and side tracks, and unites under the heading of railroad tracks all of the other values of a railway, includ-

ing the franchise value (29, 30). It is true that this court in *Branson* v. *Bush*, 251 U. S. 189, has held that in determining the value of a railway against which an assessment may be made the franchise value may be included. But the law in that case authorized a tax against "railroads" (Special and Private Acts of Arkansas, 1911, pp. 642, 645), and not merely against railroad *tracks*. The case at bar was tried by the appellants on the theory that the law in question did not authorize a tax against the franchise or intangible value of the railway companies. In their answer they say that they "deny that there has been assessed against the property of the plaintiff any taxes whatever against their intangible property or personal property" (12). On the trial of the case their counsel made the following statement: "Now, if Your Honor please, I object to that, if he means to imply by that that we have assessed anything against the franchise because that is not the best evidence. In fact we have not. We have only assessed against the track itself" (28). In their assignment of errors (19, 20) the appellants complained of the admission of proof that an intangible or franchise value was included in the property assessed by the district. The law under which the assessment in question is made having limited the property subject to taxation to railroad tracks, and appellants having tried the case on the theory that the tax was not assessed against any other railroad property, they ought not be heard at this time to say that the statute in question authorized the inclusion of an intangible or franchise value in the railroad property subject to assessment by the drainage district.

IV.

The boundaries of the district are so indefinitely described as to make it impossible to ascertain what lands are included in the district and what lands are excluded therefrom.

The northern boundary of the district is described as "the line of the hills which is entirely above overflow." The evidence showed that there was no such definite line (41, *et seq.*). An act indefinitely describing a district is invalid (*Morgan Engineering Co. v. Cache River Drainage District*, 122 Ark. 491).

V.

The act unlawfully provides for the payment of the debts of another corporation by special assessment against property in the district.

Section 30 of the Act of 1915 provides that the district thereby improved "shall assume and be liable for all indebtedness and contracts of whatsoever kind legally incurred of the said Little River Drainage District organized as aforesaid by the said County Court." The railway company cannot be chargeable with the debts of a corporation of which debts it has no knowledge and for which it has received no benefit.

The judgments of the courts below should be sustained.

Respectfully submitted,

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THOMAS, SHERIFF AND COLLECTOR, ET AL. *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 303. Argued March 9, 12, 1923.—Decided April 9, 1923.

1. The legislature of a State may, if consistent with its constitution, establish a drainage district, set the boundaries, and apportion the cost by fixing the bases of assessment and taxation; and its conclusion that lands will be benefited cannot be assailed under the Fourteenth Amendment unless palpably arbitrary or discriminatory. P. 483.
2. A portion of the franchise of a railroad may be included as real estate within such a district; and, to justify its assessment, the benefit need not be direct, and may consist of gains to be derived from increased traffic due to the improvement. *Id.*
3. But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality. P. 484.

277 Fed. 708, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court permanently enjoining the appellant drainage district and state officials from enforcing a special drainage improvement tax, levied upon property of the appellee railroad companies.

Mr. James D. Head and *Mr. Otis Wingo*, with whom *Mr. Henry Moore, Jr.*, was on the brief, for appellants.

Mr. S. W. Moore and *Mr. James B. McDonough*, with whom *Mr. F. H. Moore* and *Mr. A. F. Smith* were on the briefs, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Legislature of Arkansas created, by a special law, the Little River Drainage and Levee District of Sevier County, No. 1, a body corporate, and defined its boundaries. Act 186 of Acts of 1915, p. 747, amended by Act 79 of Acts of 1917, p. 348. This suit was brought in the federal court for the Western District of Arkansas, Texarkana Division, by two railroad companies to restrain enforcement of a tax levied in the year 1918 under that act. The defendants below were the district, its officers, and the sheriff and collector of Sevier County. The statute named a board of directors; imposed upon it the duty of constructing drainage works; empowered it to raise the necessary money by construction notes and an issue of bonds to the amount of $100,000; and directed it: "to assess and levy annually a tax upon the valuation as it shall appear each year on the assessment book of Sevier County, Arkansas, upon all lands and . . . upon the railroad tracks of companies in said district, as appraised by the Board of Railroad Commissioners . . . ; not to exceed, however, in any one year, the sum of six per cent, of the assessed valuation of the said property within the district."

The estimated cost of the improvement was about $75,000. For the purpose of defraying a part of this cost the directors levied, in the year 1918, a tax of $7,346.12, being 6 per cent. of the assessed value of all real estate within the district. Of this amount it levied upon the railroads $4,194.60, being 6 per cent. of the assessed value of their property. Upon the 12,000 acres of land, being all the other real estate in the district, the directors laid, in the aggregate, taxes of $3,151.52, being 6 per cent. of its assessed value. Thus, 57 per cent. of the burden was imposed upon the railroads and 43 per cent. upon the owners of all the other real estate. Plaintiffs claimed that the tax was void. After a hearing, at which much evidence was introduced, the District Court entered a decree for a permanent injunction. Its decree was affirmed by the Circuit Court of Appeals, on the ground that the facts reveal an instance of discrimination so palpable and arbitrary as to amount to a denial of equal protection of the laws. 277 Fed. 708. The case is here on appeal.

The applicable rules of law are settled. The legislature of a State may, if consistent with its constitution, establish a drainage district; may set the boundaries; and may apportion the burden by fixing the basis of assessment and of taxation. The legislature's determination that lands will be benefited by a public improvement for which it authorizes a special tax, is ordinarily conclusive. Its action in so doing cannot be assailed under the Fourteenth Amendment, unless it is palpably arbitrary or discriminatory. *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262; *Valley Farms Co.* v. *County of Westchester, ante*, 155. A proportion of the franchise of a railroad may, consistently with the Federal Constitution, be included as real estate within the district. To justify an assessment upon property the benefit from the improvement need not be a direct one. It may, in case of a railroad, consist of gains derived from increased traffic.

Branson v. *Bush*, 251 U. S. 182. But vague speculation as to future increased traffic receipts will not justify a basis of taxation which necessarily produces manifest inequality. Compare *Kansas City Southern Ry. Co.* v. *Road Improvement District No. 6*, 256 U. S. 658, 661. In the case at bar the lower courts concurred in their findings of controverted facts. We accept these findings. *Dun* v. *Lumbermen's Credit Association*, 209 U. S. 20. The question for decision is whether facts, admitted and found, establish that the tax levied upon plaintiffs violates rights guaranteed by the Fourteenth Amendment.

The district is wholly rural. Little River bounds it on the west and south. It contains about 12,000 acres of rich land. Only one-tenth is under cultivation. The rest is wild and untillable, because marshy or subject to overflow. The aggregate assessed value of the 12,000 acres was in 1918 only $52,525.33. The lands were then worth from $8 to $40 an acre. The proposed improvement would increase their value at least $250,000.00. Along the northerly part of its western boundary the district is traversed for a distance of about two miles, by a single-track railroad. The total length of track within the district, including a detour line and sidings, is 3.61 miles. The railroad is owned by the Texarkana and Fort Smith, and is operated by the Kansas City Southern, as part of its line from Missouri to the Gulf. The railroad property is 40.43 acres in area; and is assessed at $69,910.00. It would derive no direct benefit from the construction of the ditches and embankment designed to drain and to protect the district from overflow; because the tracks are laid upon a fill or dump (with the exception of one trestle) and are above flood level. The railroad would derive some measure of indirect benefit; because the drained land would doubtless be cultivated, and more extensive cultivation would probably increase traffic over the line.

The tax laid imposes upon the railroad, which can receive no direct or immediate benefit, a very heavy burden; and the lands which will receive a large direct (and possibly immediate) benefit, are required to bear only a very small part of the burden. The market value of the 12,000 acres may increase largely before any additional land is cultivated, or even before the improvement is made. The railroad can derive the indirect benefit, through increased traffic, only after the drainage of the wild lands has been effected and the reclaimed lands are being cultivated. The work of reclamation had not even begun. Obviously there could not be any increase in traffic receipts during the year 1918, in which the tax is laid. Appellants argue that the assessed valuation of the lands would probably be greatly raised in later years; that the assessment upon the railroad property would probably not be raised; that the proportion of the annual burden imposed upon the railroad would diminish from year to year; and that, in course of time, the aggregate of the taxes levied upon each piece of property would be thus adjusted so as to correspond to the benefits received. This argument is relied upon to save the scheme of apportionment. But it rests wholly upon prophecy. The fact is that the tax levied is grossly discriminatory. The best that can be said of the scheme of taxation (so far as it concerns the railroad) is that the burdens imposed will grow less, as its ability to bear them grows greater.

Affirmed.